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DOCKET NO. 2010-026 JANUARY 26, 2011

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY
ACTION OF GENWAL RESOURCES, INC.,
PETITIONER AND PERMITTEE; DIVISION OF OIL,
GAS AND MINING, RESPONDENT -- REQUEST FOR
BOARD REVIEW OF DIVISION ORDER DO10A,
REQUIRING BONDING FOR THE PERPETUAL
TREATMENT OF MINE WATER DISCHARGE AT THE
CRANDALL CANYON MINE IN EMERY COUNTY, UTAH.

DOCKET NO. 2010-026 CAUSE NO. C/015/0032F

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TAKEN AT: DEPARTMENT OF NATURAL RESOURCES
 1594 West North Temple, Suite 1210
 Salt Lake City, Utah 84116
DATE: January 26, 2011
TIME: 11:37 a.m. to 2:59 p.m.
REPORTED BY: Jeff S. Eaton, RPR/CSR

ATKINSON-BAKER, INC. COURT REPORTERS
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Glendale, California 91203
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<div>1 A P P E A R A N C E S 2 3 BOARD OF OIL, GAS, AND MINING: 4 Douglas E. Johnson, Chairman 5 Ruland J. Gill, Jr. 6 Jake Y. Harouny 7 James T. Jensen 8 Kelly L. Payne 9 Samuel C. Quigley 10 Jean Semborski 11 12 DIVISION OF OIL, GAS, AND MINING: 13 John R. Baza, Director 14 Dana Dean, Associate Director, Mining 15 John Rogers, Associate Director, Oil and Gas 16 Jim Springer, Public Information Officer 17 Steve Schneider, Administrative Policy Coordinator 18 Julie Ann Carter, Secretary to the Board 19 20 ASSISTANT ATTORNEYS GENERAL: 21 Steven F. Alder - Division Attorney 22 Michael S. Johnson - Board Attorney 23 Fredric J. Donaldson - Division Attorney 24 25 GENWAL RESOURCES, INC. 26 27 Denise A. Dragoo, Esq. 28 James P. Allen, Esq. 29 15 West South Temple, Suite 1200 30 Beneficial Tower 31 Salt Lake City, Utah 84101 32 (801) 257-1900 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 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<p>1 water-quality standards now so there's not a violation 2 of an EPS water-quality standards and at this point 3 there's no violation of the mine permit. 4 The Division order, itself, is not an 5 enforcement, it's not like a notice of violation. It's 6 just a notice to the operator that it needs to revise 7 it's mining and reclamation plan. So we're not in the 8 enforcement posture at this point. 9 In addition, Genwal is in compliance or is 10 proceeding to be in compliance with the Division order. 11 It has constructed the water treatment facility, it 12 has -- the first of the test requirements under the 13 Division order is to conduct additional data gathering 14 and water laundering. That is being done. That was 15 done immediately upon receipt of the order. And, in 16 addition, the mining reclamation plan has been revised 17 to reflect its additional data gathering and monitoring 18 requirements. 19 The operator's also provided as-built drawings 20 for the Division regarding the water treatment facility, 21 provided operational costs for how that water treatment 22 facility is being operated. It's also amended the 23 probable hydrologic consequences to reflect the current 24 conditions set forth that are reflected at the mine. 25 And they just on Monday submitted a work plan to conduct</p> <p style="text-align: right;">Page 6</p>	<p>1 immediately post a perpetual bond and, also, to 2 construct post-mining treatment facilities and to bond 3 those facilities. 4 We're contesting that perpetual bonding 5 requirement on two bases. First, the Division failed to 6 follow its own bond adjustment requirements. And, 7 second, it actually doesn't have statutory or regulatory 8 authority to require a perpetual bond for long-term 9 water-quality treatment. I'm going to address the first 10 of those issues and Mr. Allen will address the second. 11 So now turning to the Division order, itself. 12 If you look at paragraph 3 and I think that's up on the 13 screen, but paragraph 3 of the Division order 14 essentially provides that the operator must 15 immediately -- and by immediately they mean within 60 16 days -- post a bond or provide an annuity which will 17 yield a yearly payment sufficient to cover mine-water 18 treatment costs in perpetuity. 19 Am I getting through to Mr. Gill? Can you 20 hear me? No eye contact, probably not. 21 CHAIRMAN JOHNSON: Yes. 22 MS. DRAGOO: Okay. Good. 23 MR. GILL: Better. 24 MS. DRAGOO: The Division has just -- has 25 estimated that this yearly annual operating cost is to</p> <p style="text-align: right;">Page 8</p>
<p>1 a hydrogeologic study over the next year and that study 2 will take a look at what is the source of the water 3 discharge from the Jones Valley Fault. That will take 4 us about a year to complete and the Division has 5 provided us until November of 2011 to provide that 6 report. 7 So the operator is in compliance with 8 water-quality standards. It has built a water treatment 9 facility at considerable expense and is in compliance 10 with the Division order. 11 But the focus of today is really on two 12 aspects of that Division order and that has to do with 13 perpetual bonding and -- you can't hear me? 14 CHAIRMAN JOHNSON: Mr. Gill's having a hard 15 time. 16 MS. DRAGOO: All right. 17 CHAIRMAN JOHNSON: If you could move that a 18 little bit closer. 19 MS. DRAGOO: Okay. Is that better? 20 CHAIRMAN JOHNSON: That's better. 21 MS. DRAGOO: Good. All right. 22 MR. GILL: Much better. Thank you. 23 MS. DRAGOO: The focus of our argument today 24 is to request the board to vacate paragraphs 3 and 5 of 25 the Division order which deal with the requirement to</p> <p style="text-align: right;">Page 7</p>	<p>1 be \$325,000 and they've just chosen this, there's 2 nothing in the Division order that substantiates this 3 325,000-dollar cost and requires that there be a bond 4 posted immediately and then once a bond is posted, then 5 the Division will have an informal conference and will 6 accept the operator's request for bonding adjustment. 7 So this procedure is actually absolutely 8 opposite to what the mandatory bonding adjustment 9 provisions provide. Under the bond adjustment 10 provisions, at first they're subject to the requirements 11 regarding the termination of a bond and basically in 12 order to determine the bond, there has to be an approved 13 permit or there has to be an approved amendment to the 14 permit, and then there has to be a detailed cost 15 estimate submitted by the operator based on that 16 amendment. 17 In this case there is no long-term treatment 18 plan. The Division does not require the long-term 19 treatment plan until later in the process. So there is 20 nothing to base the perpetual bond amount on. By the 21 way, that's a mandatory requirement under 645-301-830. 22 Second, since there is no specific bond estimate, 23 there's really no basis for the \$325,000, which becomes 24 speculative. Just to give you an idea of how much money 25 this is and I think the Division would agree, in order</p> <p style="text-align: right;">Page 9</p>

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<p>1 to come up with \$325,000 annually, at today's interest 2 rates, you'd have to have an annuity up to the tune of 3 about 30 to \$33 million to generate \$325,000 annually at 4 the 1 percent interest rates that are garnered today. 5 So the Division has requested, amazingly, 6 within 60 days that the operator go out into the market 7 and obtain a 30-million-dollar annuity and then we'll 8 talk about, you know, whether this is the appropriate 9 amount or not. And, once again, just to give you an 10 idea, we just took a look at the Division's surety bond 11 summary for 2009 and it indicates that total bonds that 12 are held by the State is only 57 million. So they want 13 to have one operator essentially double that by 14 increasing it by \$37 million. And, so, I mean, that's a 15 very large number. 16 There are 28 operators that currently hold 17 bonds. Those bonds are generally in the amount of 1 to 18 2 million. I think recently there was in the amount of 19 6 million for a surface coal mine but nothing in the 20 range of \$30 million. So this is an exceptional 21 request, a very unusual request, a very high amount of 22 money, and it's based on nothing. There's nothing in 23 the record that establishes the \$325,000 operating 24 costs. There's no estimate. There's no approved mining 25 plan. So, clearly, the Division is way out on a limb on</p> <p style="text-align: right;">Page 10</p>	<p>1 for adjustment of the bond. And in light of that we 2 would request that that perpetual bond requirement be 3 vacated. That's one of the bases. In fact, any one of 4 the bases that we briefed could be a basis for vacating 5 the perpetual bonding and treatment requirements. 6 But Mr. Allen has discussed -- we also believe 7 that the perpetual bonding requirements should be 8 vacated for statutory and regulatory authority. He'll 9 provide that will provision for you. 10 MR. ALLEN: Thank you. 11 Members of the board. You have our legal 12 briefs and we appreciate the time you invest in reading 13 those and in compliance with the chairman's request, we 14 won't just rehash those today. There are three legal 15 points I want to bring up and discuss with you in this 16 hearing, however. 17 The first is really Genwal's position. Quite 18 simply that the law hasn't provided the tool that the 19 Division wishes to use to address this problem. And 20 that's really the core of our argument is whether this 21 tool, providing a long-term financial or financial 22 assurance to treat post-mining discharge is in the 23 toolbox that the statutes and rules provide. So that's 24 the first legal point I want to cover. 25 The second legal point has to do with the need</p> <p style="text-align: right;">Page 12</p>
<p>1 this one and their bond person ask-questions-later 2 approach is simply not appropriate. 3 In addition, the Division violated it's own 4 mandatory procedures for due process prior to actually 5 enforcing the bond or requiring the bond, the operator 6 has an opportunity to review the bond estimate at an 7 informal conference. And that informal conference, 8 according to the rules, is to be provided prior, not 9 after the bond is established. 10 In this case the Division argues that that's 11 fine, we'll give you the informal conference after you 12 post the 30-million-dollar bond and then you can ask 13 questions about it and we'll readjust, you know, if we 14 think that's appropriate and that's just not according 15 to the Division's procedures and rules and it's 16 inconsistent with due process. 17 The other failure of the Division in this 18 whole matter with respect to this hearing is there was 19 never any notice to the surety, that's also a mandatory 20 requirement. What the Division did do was it notified 21 IPA, the co-owner of the Genwal operation, and 22 threatened it with enforcement action. It didn't 23 mention anything about a bond or an informal conference 24 and it never sent that letter to the surety. So the 25 Division hasn't complied with any of the requirements</p> <p style="text-align: right;">Page 11</p>	<p>1 for rulemaking and we raised that issue in our briefs. 2 And I'll tell you in my discussion this morning why in 3 some senses I regret making that argument because I 4 think the problem is more fundamental. 5 And, third, and I think this is one of the 6 more important things we need to get to today, is what 7 we can learn from the other states that have attempted 8 to address long-term mine-discharge issues. The bottom 9 line on that as we'll discuss today is more law is 10 necessary if Utah chooses to go down the same road that 11 other states have gone. 12 To the first of the issues regarding whether 13 the statutes and rules provide this tool in the 14 Division's toolbox. You are aware that statutory 15 structure that Utah operates its coal program, under 16 primacy from the Federal Surface Mining and Control Act 17 by virtue of implementing Utah's own statutes and rules. 18 And it is Utah's own statutes and rules that are 19 controlling in this matter. 20 The relevant law for this particular matter is 21 found in Utah Code, section 40-10-15 providing for 22 reclamation bonding. The rules implementing reclamation 23 bonding are found at R645-301-800. And those statutes 24 and rules provide for bonding to assure that mining 25 sites are reclaimed sufficient for their post-mining</p> <p style="text-align: right;">Page 13</p>

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<p>1 land use when mining is complete.</p> <p>2 For our purposes there are really two legal</p> <p>3 questions regarding the Division's authority. The first</p> <p>4 is, can the Division require an operator to adjust its</p> <p>5 bond for this particular purpose, to provide for</p> <p>6 long-term financial assurance of treatment of a</p> <p>7 post-mining discharge?</p> <p>8 The second question is, can the Division</p> <p>9 require the type of financial assurance and the type of</p> <p>10 financial instrument that they have proposed in this</p> <p>11 case under its existing bonding authority?</p> <p>12 In Utah statutes, three types of financial</p> <p>13 assurance are authorized to bond for coal-mining</p> <p>14 reclamation: A surety bond, which, as you know, is a</p> <p>15 third-party guarantee to meet an obligation. It's</p> <p>16 essentially a contract between the operator and the</p> <p>17 surety, with the Division being the beneficiary of that</p> <p>18 contract.</p> <p>19 Under some circumstances which rarely come up</p> <p>20 an operator is permitted to demonstrate its own</p> <p>21 financial capability and self-bond. That is a fairly</p> <p>22 high bond -- high bar and it doesn't happen very often.</p> <p>23 The third type authorized in the rules is</p> <p>24 what's called a collateral bond. At the option of the</p> <p>25 operator our legislature has authorized operators to</p> <p style="text-align: right;">Page 14</p>	<p>1 out that the law is intended to prevent the burden of</p> <p>2 reclaiming sites from falling back on the public and</p> <p>3 that sets forth the means by which the government can</p> <p>4 accomplish that objective and those are the bonding</p> <p>5 mechanisms we've just discussed.</p> <p>6 As another example, bond adjustments are</p> <p>7 authorized -- for operating mines is authorized under</p> <p>8 the statute for in two circumstances; first, if there's</p> <p>9 been a change in acreage or, second, if there's a change</p> <p>10 in the future costs of reclamation. Now, that second</p> <p>11 circumstance might sound promising but reclamation is a</p> <p>12 defined term in the rules. And it means action to</p> <p>13 restore the surface of mined land to a condition</p> <p>14 sufficient to accomplish its approved post-mining land</p> <p>15 use.</p> <p>16 And what the Division is proposing in this</p> <p>17 case regarding funding perpetual treatment of water as</p> <p>18 reclamation doesn't fit squarely into that definition.</p> <p>19 The conclusion we draw is that bond adjustment is the</p> <p>20 wrong tool to address this problem. And if that</p> <p>21 conclusion is a little bit troubling, I think we need to</p> <p>22 realize that Utah's act and Utah's coal program</p> <p>23 addresses a vast array of issues and problems. It's one</p> <p>24 of the most detailed statutes on our books.</p> <p>25 And then that statute provides bonding to deal</p> <p style="text-align: right;">Page 16</p>
<p>1 post three types of collateral: U.S. Government</p> <p>2 securities; bank certificates of deposit; or cash up to</p> <p>3 the FDIC insurance limit, which is \$250,000 right now.</p> <p>4 An the important point is none of these is a</p> <p>5 funding mechanism. None of these authorized financial</p> <p>6 instruments are intended or set up to generate a stream</p> <p>7 of cash flow sufficient to fund an ongoing treatment</p> <p>8 operation.</p> <p>9 The other important point is trust funds and</p> <p>10 annuities aren't among the kind of financial instruments</p> <p>11 that our legislature has provided as acceptable forms of</p> <p>12 bonding for reclamation. I should also mention that the</p> <p>13 federal statute authorizes what's called alternative</p> <p>14 bonding systems, that the secretary of the interior for</p> <p>15 the federal program is authorized to promulgate rules</p> <p>16 providing other bonding structures that might meet</p> <p>17 unique situations. And that exists in the federal</p> <p>18 statutes, Utah's legislature, for whatever reason, did</p> <p>19 not authorize either this board or the Division to set</p> <p>20 up alternative bonding systems in the Utah statute.</p> <p>21 So the Division's focus in their briefs on the</p> <p>22 ends and objectives of its authority and its mandate</p> <p>23 only addresses half the question because the law also</p> <p>24 specifies, as you know, the means of achieving the ends.</p> <p>25 As an example, the Division correctly points</p> <p style="text-align: right;">Page 15</p>	<p>1 with the smaller subset of the total amount of issues</p> <p>2 and problems that are addressed by Utah statute in its</p> <p>3 coal mining program and those are the choices and the</p> <p>4 compromises that are worked out in our legislatures.</p> <p>5 As to my second point, I mentioned that I</p> <p>6 regretted a bit making the argument about the Utah</p> <p>7 Administrative Rulemaking Act. And the point is simply</p> <p>8 this, that as we look at the existing rules, as we look</p> <p>9 at the existing statutes, there just isn't explicit</p> <p>10 authority to require this type of a financial assurance</p> <p>11 mechanism. And whether one would engage in rulemaking</p> <p>12 and be able to produce that explicit authority is a</p> <p>13 little bit beside the point because it simply doesn't</p> <p>14 exist now. And so that's really all I wish to say</p> <p>15 regarding that, the rest of that argument is in our</p> <p>16 briefs and you've read it.</p> <p>17 Finally, to the other jurisdictions that have</p> <p>18 addressed this matter. As I said, the other</p> <p>19 jurisdictions that have faced this problem and it's much</p> <p>20 more common in West Virginia, for example, have found</p> <p>21 that what they really need is more law on the books,</p> <p>22 that the basic law that's implemented under the Surface</p> <p>23 Mining Act hasn't been enough.</p> <p>24 As to Tennessee, Tennessee has a coal</p> <p>25 regulatory program operated by the Office of Surface</p> <p style="text-align: right;">Page 17</p>

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<p>1 Mining on its behalf. And it's true, as the Division 2 pointed out in their brief, that OSM asserted in a 3 regulatory preamble, that it had authority under SMCRA 4 to promulgate rules providing for long-term financial 5 assurances of exactly the type we're talking about 6 today.</p> <p>7 But OSM never asserted, as the Division has, 8 against Genwal that it had authority to do that without 9 first promulgating rules. The other thing that I should 10 point out is OSM, when they did promulgate rules 11 providing for these kind of financial assurances, they 12 relied on their authority to promulgate rules for an 13 alternative bonding system and that's authority that's 14 lacking right now in Utah.</p> <p>15 But the third thing to say about Tennessee is 16 that whole set of rules, that whole program that came up 17 in the state of Tennessee came about in settling a 18 lawsuit brought by the Mining Association, challenging 19 exactly the statutory and regulatory authority. And 20 rather than have the court reach that issue, the parties 21 at OSM simply decided to agree to and promulgate these 22 rules.</p> <p>23 State of Pennsylvania has operated a form of 24 long-term financial assurances for mining drainages for 25 years, not under the authority of its coal program but</p> <p style="text-align: right;">Page 18</p>	<p>1 problems. And West Virginia was unable to pay for the 2 treatment at all of the sites where bonds had either 3 been forfeited or released so they took two actions. 4 First is that they increased the amount of the per-ton 5 charge so that there would be enough money to cover 6 that. And the State of West Virginia, yeah, has now 7 adopted rules taking this baby step. The rules provide 8 for a study of whether individual site-specific 9 long-term financial assurances of the type we're talking 10 about today should be implemented in West Virginia 11 either by statute or rule. So that's the status of the 12 State of West Virginia.</p> <p>13 One final point about the other states and 14 then I'll be through. In each of these other states, 15 the additional laws, whether they were statute or 16 regulation, the additional laws provided important 17 details about how the program would work that's 18 completely absent from what the Division has proposed 19 against Genwal. Some of the details that are provided 20 are, What types of securities or financial instruments 21 are acceptable in the long-term funding mechanism? Who 22 makes decisions regarding the investment objectives of 23 the securities or the deposits? Is any kind of a 24 written agreement or contract required? Who signs it 25 and who approves it? How long can an operator take to</p> <p style="text-align: right;">Page 20</p>
<p>1 under the authority of its clean streams law, a local 2 version of the Clean Water Act. But Pennsylvania has 3 just obtained on August of last year OSM approval to 4 integrate that into its coal regulatory program as an 5 alternative bonding system. They promulgated rules 6 setting forth an alternative bonding system, they 7 obtained OSM approval for that.</p> <p>8 I should also mention that Pennsylvania has 9 from time to time implemented long-term financial 10 assurances like trust funds or annuities as part of a 11 voluntary settlement in consent decrees over enforcement 12 actions for violations of the water-quality standards.</p> <p>13 To West Virginia. The differences between 14 Utah and West Virginia, I think, are the most extreme 15 and illustrate just how far ahead of the curve the 16 Division is on this particular issue. West Virginia, by 17 legislative act established a two-tier bonding system. 18 The lower tier was site specific and provided for 19 reclamation of the surface land only. The second tier 20 was not site specific. It provided for a per-ton charge 21 on all coal produced, which went into a fund by which 22 the state paid for treatment of post-mining discharge at 23 sites that had either been abandoned or where the bond 24 had been released.</p> <p>25 That system, to put it mildly, had financial</p> <p style="text-align: right;">Page 19</p>	<p>1 fully fund the principal of a long-term financial 2 assurance? Does it have to be funded immediately as the 3 Division has demanded in this case or as in some other 4 states is there provision for ramping the principal up 5 over a period of time corresponding, perhaps, to the 6 life of the existing mining operation?</p> <p>7 How should the proceeds of that investment 8 vehicle or cash deposit be used? Do they get plowed 9 back into the principal? Does it get paid out in order 10 to pay existing treatment costs? And if proceeds are 11 paid out to the operator, who is, after all, running a 12 treatment facility, what kind of charges are appropriate 13 and how is that audited? For the purposes of 14 calculating the amount, how long is perpetual, 10 years, 15 25 years, 50 years? Some of the states address these 16 kinds of things.</p> <p>17 Important point, what happens to the 18 conventional reclamation bond when mining is completed 19 but you still have a treatment facility on site? Does 20 the regulatory agency retain jurisdiction over the 21 treatment facility and does it have to be separately 22 inspected and bonded?</p> <p>23 Now, the Division might tell you that it's 24 fully capable of answering all these questions as they 25 arise but our question for the board is, Why should</p> <p style="text-align: right;">Page 21</p>

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<p>1 Genwal have to put up with that under the current 2 statutory and regulatory structure? Aren't they 3 entitled to a little more certainty and better 4 definition of the rules and if the Division is going to 5 take this step towards long-term financial assurances, 6 perhaps in a rulemaking process lots of other parties 7 need to be -- need to weigh in on that.</p> <p>8 The bottom line, the coal program, as it 9 exists today, isn't set up to address long-term 10 discharges by requiring site-specific funding under its 11 existing bonding authority. Genwal doesn't believe it's 12 necessary in this case but if the Division does, then it 13 needs to have additional law on the books and that's the 14 legal argument at this point.</p> <p>15 MS. DRAGOO: Fine. I just wanted to conclude 16 by addressing some of the unfounded and alarmist claims 17 of abandonment that were raised by the Division.</p> <p>18 This operator is here to stay. Utah American 19 has three mines in Utah and it's not going to be 20 abandoning its responsibilities at the Crandall Canyon 21 Mine. It has informed BLM that it will be reopening the 22 mine, or at least the southeast portion of that mine, 23 sometime in 2012. So the operator's here to stay and 24 the allegations of abandonment are really unfounded and 25 really kind of inappropriate in our book.</p> <p style="text-align: right;">Page 22</p>	<p>1 to have them available as I will be referring to them.</p> <p>2 And if you provide copies to the -- yeah, the 3 Division. But, first, yeah, I'd like to use the 4 projector, if I could, at least the one in front of you. 5 And it would help if I could see it, too. Although, I 6 can refer to the -- I don't need the screen. I've got 7 the computer. If you have it on your computer screens.</p> <p>8 CHAIRMAN JOHNSON: It's on.</p> <p>9 MR. ALDER: Okay. Great.</p> <p>10 So, first of all, let's not undersell this.</p> <p>11 This is an important question and it's an important 12 question for a lot of reasons. It isn't a question of 13 whether or not Genwal's going to cut and run. The law 14 assumes that bonding is a necessary aspect, one of the 15 tools as has been stated, that need to be in the chest 16 of the Division to make sure that all of the 17 requirements of the act are complied with.</p> <p>18 But this is an important case because it 19 involves important environmental values, water that's 20 used by the people of the state of Utah for recreation 21 as well as domestic and agricultural issues. It's an 22 important case because it involves a large amount of 23 money, as has been stated. The potential liabilities to 24 the company or to the citizens of the state of Utah are 25 not insignificant and so this requires some careful</p> <p style="text-align: right;">Page 24</p>
<p>1 The operator has been working with the 2 Division to meet the requirements through the Division 3 order. The operator has spent nearly half-a-million 4 dollars in a treatment facility. This operator is not 5 going to cut and run and so with that, we'd request that 6 you vacate those perpetual bonding requirements and we 7 will continue -- the operator will continue to meet the 8 requirements of the Division order and will continue to 9 meet its responsibilities under the operational program 10 to meet water-quality standards and treat to meet those 11 water-quality standards.</p> <p>12 CHAIRMAN JOHNSON: Okay. Thank you, 13 Ms. Dragoo, Mr. Allen.</p> <p>14 Mr. Alder, would you will like to take 30 15 minutes, please?</p> <p>16 MR. ALDER: Yes. Thank you, Mr. Chairman and 17 members of the board.</p> <p>18 I had a slightly longer oral argument prepared 19 and I hope you'll bear with me as I try to shorten it 20 and I would also like to have a little bit of time to 21 address some of the more recent statements that have 22 been made about the Division's action.</p> <p>23 But, first of all, I'd like Julie to pass out 24 a couple of exhibits. These are exhibits that you've 25 seen that have been in the briefing, but I just want you</p> <p style="text-align: right;">Page 23</p>	<p>1 attention by the board.</p> <p>2 Further, this is an important case because 3 we're setting some precedent in Utah. This is an 4 issue -- acid mine drainage is an issue that comes up 5 quite often in the east and has been dealt with in those 6 states but this is one, in fact, so far as the Division 7 failed to determine the only instance where there's a 8 potential for post-mining pollutional discharge that 9 will require treatment after mining ceases.</p> <p>10 And so we're asking the board to listen 11 carefully to the Division's arguments and keep in mind 12 that under this case and this petition that's been 13 brought, the burden of proof is on the Petitioner, on 14 Genwal, and that the Division, as it interprets and 15 applies the rules and the statutes, has the expertise 16 and is entitled to deference, and some degree of its own 17 analysis and interpretation, as it applies those rules.</p> <p>18 And you'll see as we go through this, that's 19 particularly important in this case.</p> <p>20 I'd like you to first look at the findings 21 that are contained in the Division order. That's the 22 first document that's been handed out to you and it's 23 the one that's on the screen now. This is the portion 24 of Division Order 10A that contains the findings, which 25 the parties have agreed for the purpose of this hearing,</p> <p style="text-align: right;">Page 25</p>

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<p>1 you can assume to be true. And I'm not going to go 2 through them in any great detail but I think it's 3 important to look at the timeline. And so the next 4 exhibit is a timeline and you can refer to this Division 5 order if you have any questions about the details. But 6 the way this incident and this problem arose, and, of 7 course, we're all familiar with the tragic and 8 catastrophic coal burst that occurred on August 6th and 9 August 16th of 2007. As a result of that, this mine was 10 closed and eventually put into temporary suspension.</p> <p>11 Probably most people lost track of what was 12 happening after that. But on January 2008, 13 unexpectedly, water began to flow from the mine portal. 14 This water was not contaminated, it was a nonpollutional 15 discharge but it required a permit change and Division 16 Order 880 was issued on April 22nd requiring that the 17 operator address these changes that needed to be 18 addressed in the permit.</p> <p>19 On October of that year, October of 2008 it 20 was noted that iron concentrations which had been 21 increasing, had consistently exceeded the water-quality 22 standards. The gap in the timeline between 23 October 28th and November 20 -- November 2009 is a 24 period of time where there was a lot going on and I 25 think you can refer to the earlier findings, but the</p> <p style="text-align: right;">Page 26</p>	<p>1 treatment were to cease. The Division determined to 2 undertake its own hydrologic evaluation and prepared a 3 70-page report, which you will have the opportunity to 4 examine in detail, as well as the contrary report 5 assuming you uphold the right of the Division to request 6 this bonding. As a result of that report, which was 7 issued on June 7th, the Division issued its Division 8 Order 10A on August 17th.</p> <p>9 So the point here is the Division has not 10 acted in haste, there have been four years of discharge, 11 two years of contaminated discharge. The Division has 12 worked with Genwal for a year and a half to adjust it 13 and try to come up with this problem and contrary to the 14 statements, what was suggested about being in compliance 15 with the issue of 10A, is the Division still does not 16 have the cost information that it has requested as part 17 of 10A and it has consistently requested and so it did 18 have to rely on its own estimate of \$325,000 when it 19 asked that a bonding amount be set. But we'll get to 20 the details of Division 10A and how that bonding amount 21 process was to work in just a minute.</p> <p>22 The other thing that needs to be gathered from 23 this timeline is that the Division really had no choice 24 but to issue 10A in light of the response by Genwal that 25 they were not going to address and objected to the</p> <p style="text-align: right;">Page 28</p>
<p>1 main thing is there was an attempt by the mining company 2 and by the Division to work together to arrive at a 3 chemical treatment and physical treatment method that 4 would bring down the water-quality problems in a 5 consistent manner.</p> <p>6 Finally, after these problems continued to 7 persist, on November 24th, 2009, more than a year ago, 8 the DO9A was issued, which asked that Genwal address the 9 high iron levels and for the first time asked that they 10 include bonding to cover the costs of water treatment. 11 That was revised on December 21st, 2009, and they were 12 given an additional amount of time to comply with that 13 order. So initially it was in November, they were given 14 30 days in December, they were given till March.</p> <p>15 On March 1st, Genwal met with the Division and 16 for the first time presented what they claimed were -- 17 was a report to substantiate that the iron levels would 18 naturally go down and, secondly, advised the Division 19 that they would not comply with the request for bonding, 20 they did not believe the Division had legal authority to 21 require bonding for post-water -- I mean, post-mining 22 water treatment.</p> <p>23 This was a crucial point in the junction of 24 this permit dispute. At that point in time there was a 25 flat, no, and there was a continued violation if</p> <p style="text-align: right;">Page 27</p>	<p>1 authority of the Division to require any bonding to 2 cover the costs of water treatment.</p> <p>3 Now, the arguments that have been argued in 4 the brief that was filed by Genwal has four arguments. 5 The first one has, apparently, almost gone away which 6 was that the act, itself, doesn't allow for bonding of 7 water treatment. The second was the Division had to do 8 rulemaking. The third was that the Division must wait 9 until mining resumes before requiring additional 10 bonding. And, finally, the last one, which we'd like to 11 spend the most time with this morning is the Division 12 should first determine the amount of bond and has failed 13 to determine the amount of bond and follow its own 14 rules.</p> <p>15 So let me address that last point first, 16 because I think that's what we're really down to. I 17 think we've sort of beaten this down to now it's a 18 question of how are we doing it, not can we do it. And 19 I want to remind at you that, first of all, this is an 20 unanticipated pollutional mine-drainage problem. 21 Usually a permit would not be issued if this problem 22 existed and so there were requirements that there would 23 be adjustments in the mine permit, the law requires 24 that. It says that when circumstances change, that the 25 permit must be modified. So the Division followed the</p> <p style="text-align: right;">Page 29</p>

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<p>1 rules that address permit changes and that if we could 2 look at the Rule 645-303-212, that's under permit 3 changes. And it sets forth in there that, first of all, 4 there would be an inspection by the Division. The 5 Division held an inspection and the Division determined 6 that the mine was not in compliance with this discharge, 7 and I don't think that's a contested fact.</p> <p>8 The Division then issued its order and that's 9 the second step that was provided for under this Rule 10 303-212, and in that order they required that a permit 11 modification or permit change application be provided. 12 Now, under the rules of 303-220, a permit change 13 application, of course, has to comply with all of the 14 other requirements of 645-301 and 302.</p> <p>15 So all those requirements, of course, include 16 protecting the hydrologic regime as outlined in point 17 one of our first brief and include providing adequate 18 bonding, also, as pointed out in the brief.</p> <p>19 Specifically, in addition, the Division 20 followed the requirements of the bonding rules and those 21 bonding rules are at 645-301-830.440. They're up there.</p> <p>22 CHAIRMAN JOHNSON: They are. Okay.</p> <p>23 MR. ALLEN: And those say that, "When there is 24 a permit revision or modification, that the Division 25 will require an adjustment in the bond to conform to the</p> <p style="text-align: right;">Page 30</p>	<p>1 order. It has five steps that I think you'll find are 2 reasonable methods for the Division to apply these rules 3 that we've just gone through to the problem at hand.</p> <p>4 Step 1 and step 2, won't have to spend much 5 time on. Those address the need for additional 6 monitoring and reporting in detail since this is not 7 your typical water discharge problem.</p> <p>8 Step 3 is a crucial one. Step 3 is one that 9 requires an interim bond, trust fund, or other financial 10 instrument in an amount sufficient to cover initial 11 estimated annual operating costs of \$325,000 in 12 perpetuity.</p> <p>13 Now, there are some things about this language 14 that I think should be important to the board. Genwal 15 has taken issue with the word "perpetuity," and I've 16 addressed that in the brief and I'd just like to point 17 out that the language does not require that this bond be 18 held in perpetuity, it merely requires that the amount 19 be determined based on a calculation of costs sufficient 20 to cover the obligation for a long period of time. And 21 I won't go into that argument at this point.</p> <p>22 The second thing is that the language provides 23 for a bond, trust fund, or other financial instrument 24 and provides the option to Genwal to propose how it 25 would cover these costs.</p> <p style="text-align: right;">Page 32</p>
<p>1 permit as revised."</p> <p>2 So the Division did not make anything up. 3 They didn't act arbitrarily or prematurely. They took 4 the action required by the rules. They had an 5 inspection. They concluded that a modification is 6 required. They issued a Division, order which required 7 modification and they required, as required by those 8 rules, that they also modify the bond.</p> <p>9 It was not premature. If anything, they gave 10 an inordinate amount of time to Genwal to come up with a 11 method and to try to get some costs so they could get 12 their handles around this problem. In fact, OSM issued 13 a 10-day notice directing the Division to take action to 14 address both the discharge and the bonding.</p> <p>15 So the third thing that I want to draw your 16 attention to is the nature of the Division order that 17 was issued. And so you can see that there was a 18 substantial amount of cooperation, of working with the 19 operator. There was a separate hydrologic study that 20 determined that there was good reason to see that this 21 discharge was going to continue and going to continue to 22 need treatment. There was careful consideration, then, 23 as to what actions should the Division take. And they 24 issued the Division order.</p> <p>25 I'd like you to just look at the Division</p> <p style="text-align: right;">Page 31</p>	<p>1 But the next thing that's important is in the 2 following paragraph it says -- or in the following 3 sentence of that same paragraph. It says, "The bond or 4 yearly payment amount will be adjusted when Genwal 5 Resources supplies more detailed cost information for 6 the operation of a treatment system or based on the 7 design and cost estimates for a post-mining reclamation 8 phase treatment system.</p> <p>9 There's nothing in this order that prohibits 10 Genwal from giving that information as soon or -- and, 11 frankly, would have -- should have provided it sooner if 12 they had any objections to the amount. That is the 13 basis for the determination of the bond is the cost of 14 running the system. But the Division made its provision 15 in the Division order, itself, that the amount will be 16 adjusted when that information is available.</p> <p>17 The next thing in the following paragraph 18 provides that this posting of the bond is not done 19 contrary to the rule as has been suggested today but, 20 rather, this Division order incorporates the rules and 21 it provides that the Division will be subject to 22 approval of the Division, that's in the rules. I don't 23 think that's contested, that any bond that's posted has 24 to finally have the Division's approval. The Division 25 has a final approval as to form and amount. But it will</p> <p style="text-align: right;">Page 33</p>

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<p>1 be based on a notice which provides for an informal 2 conference and an opportunity for further input from 3 Genwal.</p> <p>4 So at this point I think I would like to point 5 out that under the code, 40-1017.1 and 40-1012.1B and 6 40-106.9, the act provides that the Division is entitled 7 to discretion and may enact additional requirements in 8 applying and enforcing the act. And I think this is 9 where the deference that the board can give to the 10 Division and its application of these rules to these 11 circumstances comes into play.</p> <p>12 The circumstances are not made up. But they 13 do require an application of the rules to the facts and 14 I think it's been done in a fair and reasonable manner.</p> <p>15 I think I'll skip the rest of the portions of 16 the Division order except to point out to you that 17 there's a continued refinement and opportunity to adjust 18 the amount with the goal to have an amount and a surety 19 that will be sufficient after mining ceases. I'm also 20 going to skip argument 3. Argument 3 was that you 21 shouldn't do this while the mine's in suspension. I 22 think the rules clearly provide that temporary 23 abandonment does not relieve the company of its 24 obligations and, additionally, it would certainly be 25 foolish to allow someone not to address a problem just</p> <p style="text-align: right;">Page 34</p>	<p>1 this language from this rulemaking is important to the 2 board for the reason that OSM, obviously, gave this 3 language published in the Federal Register a great deal 4 of thought and, frankly, they have stated the argument 5 as to why the statute requires, not allows, but requires 6 bonding in this circumstance much more succinctly than I 7 have.</p> <p>8 But it says, "SMCRA, it's implementing 9 regulations and our policy require that the performance 10 bond be sufficient to cover treatment of those 11 discharges in the event that the permittee fails to do 12 so." Now, when it refers to "those discharges" you can 13 refer to the previous page where it talks about this 14 rule and says that this bond -- this rule is to address 15 the performance bond to cover the treatment of 16 post-mining pollutional discharges.</p> <p>17 So they go through the same arguments that we 18 have. First of all, that, "SMCRA requires that each 19 permittee post a bond conditional upon faithful 20 performance of all of the requirements of the act and 21 the permit.</p> <p>22 Second, the act specifies that, "The amount of 23 the bond shall be sufficient to assure completion of the 24 reclamation plan if the work had to be performed on 25 regulatory authority in the event of forfeiture."</p> <p style="text-align: right;">Page 36</p>
<p>1 because they're in suspension.</p> <p>2 I think the time remaining, I'd like to 3 address -- have the board address the rulemaking 4 argument and, specifically, I'd like to skip the 5 arguments about Utah law and whether or not under Utah 6 law rulemaking is required. I think that's been 7 addressed in the briefs. I think that's pretty -- and, 8 in fact, it's really very clear that rulemaking is not 9 required by the Utah Rulemaking Act in this instance.</p> <p>10 The thing that I think that has been pointed 11 out as we deal with this rulemaking question is the 12 rulemaking of other states and how that has 13 application -- not direct application, but application 14 as to what Utah can do and has done in this 15 circumstance.</p> <p>16 So I'd like to direct the board's attention to 17 the other handout that I provided you, which is the 18 Federal Register for the Tennessee rulemaking. And I'd 19 ask you to turn to Page 9617. My technical abilities -- 20 oh, jeez -- I was going to say, my technical abilities 21 didn't allow me to make this on it but Fred's did. 22 Thank you.</p> <p>23 If you go down on the left column to the 24 fourth paragraph where it begins, "SMCRA, it's 25 implementing regulations and our policy." I think that</p> <p style="text-align: right;">Page 35</p>	<p>1 Again, we're not trying to be alarmists or discount the 2 credibility of the company but the law requires that the 3 bonding considered the potential of forfeiture.</p> <p>4 Next it says that, "The amount of the bond or 5 deposit required and the terms of each acceptance of the 6 applicant's bond shall be adjusted by the regulatory 7 authority from time to time as affected acreages are 8 increased or decreased or where the cost of future 9 reclamation changes." True, reclamation is a defined 10 term but within the reclamation plan that's required by 11 SMCRA and the rules is a hydrologic reclamation plan and 12 that hydrologic reclamation plan, as I pointed out in my 13 brief, includes treatment of discharges for permanent 14 impoundment, requires protection of the hydrologic 15 balance and all of the other things are part of the 16 reclamation plan. And I think that the OSM mentions 17 that here.</p> <p>18 Now, briefly, OSM, as I deal with this 19 Tennessee rule, it dealt with an interesting history. 20 They talk about in 1979 OSM's rules said it was 21 discretionary with the agency whether or not they 22 required bonding under these circumstances, in an 23 unanticipated pollutional discharge, and they point out 24 that in 1983, after further experience when this act, 25 and the statutes and, frankly, the cases that had been</p> <p style="text-align: right;">Page 37</p>

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<p>1 decided, they determined that increases in bond amounts 2 under these circumstances are mandatory, not 3 discretionary. 4 If at any time the cost of future reclamation 5 under the bond changes, regulatory authority is required 6 to adjust the bond according to section 800.15A, thus, 7 the amount of the bond for any increment must at all 8 times be sufficient to assure completion of the 9 reclamation plan if the work had to be done by the 10 regulatory authority. 11 This is just common sense. I mean, if you 12 had -- if you were the owner and you were bonding for 13 your own personal residence and you had these kind of 14 risks on your property, of course, these are the steps 15 that you would take. And it goes through some 16 additional information there about guidelines that were 17 adopted and -- and then it talks about the Pennsylvania 18 program and in the Pennsylvania program and in the West 19 Virginia program that have been talked about, things are 20 not the same, it's true. 21 In Pennsylvania they deal with these issues 22 primarily under the Clean Water Act and issues under 23 consent decrees under the Clean Water Act. 24 In West Virginia, thank goodness Utah does not 25 have the problems that West Virginia has. In West</p> <p style="text-align: right;">Page 38</p>	<p>1 conclusion, the Division does not oppose the board 2 looking at the rules and, in fact, I think the board -- 3 the Division would concede that this is a difficult 4 issue of how do you provide surety for such a long term 5 that provides continued flow of money. There are other 6 alternatives, but there's nothing in the statute, 7 there's nothing in the Division order, and there's 8 nothing in the rules that prohibit that from happening 9 now and that is an acceptable response to this Division 10 order. 11 We think that the board should uphold the 12 Division order, at least the legal authority, should 13 uphold the legal authority the way it was implemented by 14 the Division, allow us to move to the next stage and the 15 next stage will have the hydrologic evaluation report 16 and we can determine to the finest degree you find 17 necessary whether or not there is a probability that 18 this problem needs to be dealt with by bonding and then 19 we can move to the third stage, which is to address this 20 question that Mr. Allen suggested has all kinds of 21 possible answers, which is, What is the form of the 22 surety? What is the amount of the surety? 23 But before we get to that we need to have some 24 interim security in place and we need to go through the 25 steps that are provided for in the rule for an informal</p> <p style="text-align: right;">Page 40</p>
<p>1 Virginia they're pretty much upside down all the time 2 and the citizens of the state of Utah -- of the state of 3 West Virginia -- excuse me. The citizens of the State 4 of West Virginia subsidize -- five minutes, thank you -- 5 subsidize the program and it was exactly, in the cases 6 cited in the brief, it was exactly that problem that the 7 court found to be contrary to SMCRA and required that 8 the operators fully fund their alternative system for 9 this type of unexpected pollutional discharge. 10 But we don't have a taxpayer fund and bonding 11 system in Utah so West Virginia isn't applicable but 12 when you look at the bottom line of this rule and the 13 conclusion that they reached with regard to their own 14 proposed rulemaking, I would just ask you to look, 15 finally, at -- on Page 9619, the last paragraph of the 16 middle column where they say, "The successful 17 implementation of trust and annuities in the 18 Pennsylvania program and our exclusive addition of 19 trust lands and annuities as an ABS in Tennessee with 20 this rulemaking demonstrate that adequate authority for 21 the use of trust funds and annuities is already 22 available under SMCRA." In other words, rulemaking 23 isn't required. "SMCRA and it's implementing 24 regulations, therefore, a national rule is not needed." 25 So I think that the board can reach the same</p> <p style="text-align: right;">Page 39</p>	<p>1 conference and, hopefully, we'll get some additional 2 information as they comply with the rest of the Division 3 Order 10. 4 I think I've -- have I taken all my time? 5 CHAIRMAN JOHNSON: Two minutes. 6 MR. ALDER: Two minutes left? I think I'll 7 save those two minutes. 8 Thank you. 9 CHAIRMAN JOHNSON: Okay. We appreciate both 10 parties limiting themselves to the 30 minutes we 11 specified. Let's go ahead and take a break for lunch 12 and then we will resume. Can everyone be back at 1:30? 13 Let's shoot for 1:30 and then we'll resume questions for 14 the board. 15 Thank you. 16 (Lunch Recess taken.) 17 CHAIRMAN JOHNSON: Let's go back on the 18 record. Okay. Questions from the board? 19 MR. GILL: Start on this side and move down. 20 CHAIRMAN JOHNSON: However we'd like to go. 21 Go ahead. 22 MR. GILL: As I look at this, kind of as a 23 board put in a position of choosing between the 24 repugnant and the disastrous. I mean, that's how I 25 begin to see this thing and so I'm wondering how to</p> <p style="text-align: right;">Page 41</p>

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<p>1 frame a solution that is meaningful, equitable, and 2 fair. And I was looking at the statute, in particular 3 40-10-6, subparagraph 9, and I'll read that to you. It 4 says that, "Generally, the Division and the board have 5 authority, quote, to do all other things and to take 6 such other actions retroactively or otherwise within the 7 purposes of this chapter as may be necessary to enforce 8 its provisions." 9 And so the -- the quandary I'm in is I believe 10 that we need to make sure operators know the rules of 11 the game before they play. I find it bad and offensive 12 to change the rules after somebody's invested their 13 money and is on the playing field. By the same token, 14 the statute requires us to get a result, the end result 15 is land that's reclaimed, and to the extent there's a 16 condition, as I defined it, as unforeseen comes up, how 17 do we deal with that? 18 And so it comes to then -- I divide the 19 discussion, then, into two areas. The first one is what 20 does the Division have the power or what should it be 21 doing? Clearly, they should have guidelines and rules 22 and to that extent, Mr. Allen, I think your comment has 23 a lot of weight, but by the same token, there is an 24 existing rule out there that says, If you do have 25 changed circumstances, the bond can be reviewed and</p> <p style="text-align: right;">Page 42</p>	<p>1 MR. GILL: Closer to the mic if you would. 2 MS. DRAGOO: Addressing the second question 3 first and then I'll let Jim address the first question. 4 But regarding unforeseen circumstances, I 5 think we are jumping the gun here a bit. You know, 6 the -- right now the Division is not following its own 7 rules regarding how to bond this situation. 8 Under the rules there has to be a long-term 9 treatment plan. It has to be approved. There is no 10 long-term treatment plan, it has been approved. Once 11 it's approved then the operator goes forward with a cost 12 estimate. The operator can't conform to the cost 13 estimate until it knows, you know, what it's estimating. 14 And then the Division reviews those costs and schedules 15 a hearing and notifies the surety and then everyone gets 16 a chance to say their piece. So that hasn't happened in 17 this case. 18 MR. GILL: And in your view, that's a 19 condition precedent. 20 MS. DRAGOO: Yes, it is a condition precedent, 21 not in my view but in the rules, the rules are 22 mandatory. So, yeah. 23 If you'll take a look at -- you talk about 24 adjustment of amount that's in 830.400. That goes to 25 the procedures of how the Division will notify the</p> <p style="text-align: right;">Page 44</p>
<p>1 changed. 2 So my questions then begin, first of all, 3 without suggesting that this is a conclusion, if you 4 were to have some resolution, question number one is 5 would the State have to be the ownership of that bond or 6 if it were an annuity would the State be the one that 7 would own that annuity or could it contract with 8 someone? 9 The second one would be, what happens if the 10 unforeseen circumstance on its own changes to where it's 11 no longer an issue? So you've set up this elaborate 12 structure to pay for the long-term care of this 13 unintended consequence and then it goes away, how do you 14 get the money back to you guys? And how do we do that 15 under some sort of rule? 16 So I'm just -- I'm going to let you address 17 those two issues first and then I'll follow up. 18 MS. DRAGOO: Okay. 19 MR. GILL: Because the repugnant is to have 20 Genwal have to put up an inordinate amount of money. 21 The disastrous is for the State of Utah and its 22 taxpayers to pay for what you should have paid for. So 23 those there's the dilemma. 24 Address that, please, if you would. 25 MS. DRAGOO: Well, just addressing that --</p> <p style="text-align: right;">Page 43</p>	<p>1 permittee of any proposed adjustment and provide an 2 opportunity for an informal conference on the 3 adjustment, so that's got to happen before the bond is 4 adjusted and that hasn't happened in this case. 5 In addition, in determining the bond amount, 6 that's under 830.100. It depends on the requirements 7 under 120 of the approved permit, the reclamation plan, 8 and, second, it depends on the detailed estimated cost 9 and supporting calculations submitted by the permit 10 applicant. That hasn't happened here. 11 So I think we're just getting the cart before 12 the horse. What, the Division actually came up with a 13 good recommendation and has a -- Page 3 of the Division 14 order findings, the hydrologic evaluation, the Division, 15 itself, made recommendations that there be information 16 collection, which is happening, that there be a 17 provision of the hydrologic consequences, which has 18 happened, and that the operator complete a comprehensive 19 investigation and a treatment study, which is a 20 treatability study, the operator's undertaking that, and 21 that then there should be revision of the operational 22 treatment system. 23 And they don't even get into the question of 24 long-term treatment. So until those studies are done, 25 you know, then the next paragraph is the Division</p> <p style="text-align: right;">Page 45</p>

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<p>1 jump -- or the Division order then jumps to requiring</p> <p>2 perpetual treatment of mine-water discharge without</p> <p>3 having those studies and those studies are very</p> <p>4 important, the data collection is very important, the</p> <p>5 treatability is very important, and all of those will go</p> <p>6 into, you know, if we determine that the problem is</p> <p>7 perpetual, then we'll go into a plan, the plan will then</p> <p>8 be approved.</p> <p>9 MR. GILL: Point made.</p> <p>10 MS. DRAGOO: Then estimates, you know, but</p> <p>11 we're just jumping the gun here. I think that's where</p> <p>12 we're at.</p> <p>13 MR. GILL: Jim, what's the next?</p> <p>14 MR. ALLEN: The answer to your question about</p> <p>15 how contingences in the future would be addressed,</p> <p>16 whether the bonded amount would need to be adjusted</p> <p>17 again if, for example, treatment were no longer</p> <p>18 necessary. The first thing to say is that those are</p> <p>19 exactly the questions that the Office of Surface Mining</p> <p>20 felt were worthy of additional rulemaking in the state</p> <p>21 of Tennessee, to answer those very questions.</p> <p>22 The second answer is, you know, there's always</p> <p>23 a bond, you know, a bond release action. The problem,</p> <p>24 and as you're aware, an operator can apply for release</p> <p>25 of its bond upon completion of successful reclamation.</p> <p style="text-align: right;">Page 46</p>	<p>1 a lot to address the potential disaster that we're --</p> <p>2 we're contemplating and at this point Genwal has</p> <p>3 avoided. But the narrower question is is the bonding --</p> <p>4 the reclamation bonding mechanism also available? And</p> <p>5 that's the point of dispute.</p> <p>6 MR. GILL: All right. Mr. Alder, would you</p> <p>7 respond to if you disagree?</p> <p>8 MR. ALDER: Yes, I'd like to.</p> <p>9 First of all, I think that Ms. Dragoo has kind</p> <p>10 of conflated the portion of the rules that deal with</p> <p>11 adjustment of bonds and I'd like to just look at the</p> <p>12 language a little more carefully.</p> <p>13 These are all the 301 rules that deal with</p> <p>14 bonding in the 800 section so under 800 or 820.100, this</p> <p>15 is the one where she referred to where it says, "After a</p> <p>16 permit application under 645-301 has been approved,"</p> <p>17 then she says, "Then we ask for bonding," but, actually,</p> <p>18 the rest of that says, "But before a permit is issued,</p> <p>19 the applicant will file with the Division on a form</p> <p>20 prescribed and furnished by the Division a bond or bonds</p> <p>21 for performance made payable to the Division and</p> <p>22 conditioned upon faithful performance of all the</p> <p>23 requirements of the State program, the permit, and the</p> <p>24 reclamation plan."</p> <p>25 So that's the argument that we've made before,</p> <p style="text-align: right;">Page 48</p>
<p>1 The problem, as I see it, is the successful reclamation</p> <p>2 standards are written in terms of revegetation and</p> <p>3 reclamation of the surface, and it doesn't really give</p> <p>4 you much definition about what kind of standard would</p> <p>5 apply to releasing a bond that was held for the purpose</p> <p>6 of post-mining water treatment.</p> <p>7 Now, if I may, Mr. Gill, I'd like to take</p> <p>8 issue with your comment about the disastrous. Under the</p> <p>9 existing program with the statutes and rules we have in</p> <p>10 place in Utah today, there's no question that the</p> <p>11 Division can require Genwal to treat the water that it's</p> <p>12 discharging from the mine. They did that. There's no</p> <p>13 question that the Division can require that treatment</p> <p>14 for as long as the iron levels exceed the permissible</p> <p>15 limits, and there's no question that the Division can</p> <p>16 require the operator to pay every dime of the cost of</p> <p>17 that treatment for as long as it takes. And there's no</p> <p>18 question that the Division can withhold release of the</p> <p>19 bond and retain jurisdiction over the site for as long</p> <p>20 as that discharge continues to exceed the limits if it</p> <p>21 isn't treated.</p> <p>22 Finally, there's no question that the</p> <p>23 Division's got a variety of enforcement tools at its</p> <p>24 disposal if the discharge exceeds the limits and isn't</p> <p>25 treated. So there's -- in the existing program there's</p> <p style="text-align: right;">Page 47</p>	<p>1 that bonding has to cover all these things including</p> <p>2 protection of the water resources.</p> <p>3 But the language that she refers to where it</p> <p>4 says, "After a permit application has been approved,"</p> <p>5 that part's true but the second part says, "But before a</p> <p>6 permit is issued." The reason for that is you don't</p> <p>7 want disturbance and problems to start until you've got</p> <p>8 a bond in place. The difference is under a adjustment</p> <p>9 to the bond, you have an ongoing problem. You have an</p> <p>10 ongoing situation and you can't say, "Well, you can't do</p> <p>11 anything until you get a bond in place," because it's</p> <p>12 going on all the time. So you have to have the bond.</p> <p>13 MS. DRAGOO: Excuse me. That's the wrong</p> <p>14 rule. It was 830.100 where termination of bond amount</p> <p>15 depends on the approved permit and reclamation plan.</p> <p>16 That's 830.120 and then the adjustment of the amount,</p> <p>17 that's your bond adjustment that you're talking about,</p> <p>18 830.400 .</p> <p>19 MR. ALDER: Well --</p> <p>20 MS. DRAGOO: Look at the 420, "The Division</p> <p>21 will, it must mandate to notify the permittee and to</p> <p>22 have an informal conference."</p> <p>23 MR. ALDER: Right. I'm coming to that.</p> <p>24 MS. DRAGOO: Okay.</p> <p>25 MR. ALDER: Thank you.</p> <p style="text-align: right;">Page 49</p>

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<p>1 The provision about determination of bond 2 amount is still part of the same permitting, bonding 3 concept that happens before disturbances. The 4 adjustment, the one we're coming to, first of all, says 5 that, "The amount of bond or deposit required and the 6 terms and acceptance of an applicant's bond will be 7 adjusted by the Division from time to time as area 8 requiring bond coverage is increased or where the cost 9 of future reclamation changes." 10 That's the condition, where the cost changes. 11 And if you go back again to where we were 12 previously, 812-700, it says, "The Division required in 13 the permit that adequate bond coverage be in effect at 14 all times." So it -- the rules are consistent with the 15 Division's argument that we have to take care of this 16 problem and adjust it in the way that we are. We're 17 still providing an opportunity for input, public notice 18 but the argument, on the other hand, doesn't make sense. 19 I mean, in a way it makes sense, sure, I can understand 20 that you want to have some information, you want to get 21 it all before you would do it as carefully as possible. 22 I think we've made the point that we really made our 23 effort to do that. 24 But you can't just say, "Well, you know, you 25 still haven't got those costs information, we're still</p> <p style="text-align: right;">Page 50</p>	<p>1 what happens in year one has to happen for a hundred 2 years. What happens in year one or year two can be just 3 a normal surety and then you can say, "Well, now we got 4 a pretty good idea this is not going to be quite as 5 expensive, but we're not going to be around maybe as 6 long as this takes so we want to set up a third-party 7 escrow," or something. But it doesn't have to be that 8 way. 9 The rule just says there needs to be a surety 10 and I don't think, although the discussion in the rules 11 talk about these alternatives, that's not necessary. 12 MR. GILL: One of the assumptions was is you 13 couldn't, that if the State outside of this Division, if 14 the State didn't have a generic system for handling the 15 bonds, that we couldn't, you know, you couldn't impose 16 one, the board couldn't impose one, and I wanted to 17 address that assumption. So if the third party can hold 18 that bond as long as it's payable to the Division, then 19 that's -- 20 MR. ALDER: Yeah. That's the norm -- 21 MR. GILL: -- a piece of the puzzle that 22 allows us, then, to analyze the total solution. 23 MR. ALDER: That's the normal way it's done. 24 MR. GILL: And the second question, you want 25 to address the other one?</p> <p style="text-align: right;">Page 52</p>
<p>1 working on that plan, we're still trying to figure out 2 how we're going to do this," and in the meantime we have 3 no bonding. That's the way the rules are not meant to 4 be applied. 5 The rules require that there be bonding in 6 place at all times. So I think that's one answer, 7 Mr. Gill. 8 MR. GILL: I'm going -- 9 MR. ALDER: You asked two other questions that 10 actually haven't been addressed, which was who owns the 11 bond and what happens to the bond? 12 MR. GILL: That's right. I mean, I don't know 13 where in the statute says the State has to own that 14 bond. 15 MR. ALDER: And we're not suggesting that. 16 MR. GILL: It has to be payable to the 17 Division. 18 MR. ALDER: Right. 19 MR. GILL: Why couldn't Zions Bank's trust 20 department own that? 21 MR. ALDER: Exactly. 22 MR. GILL: Or why couldn't, you know, an 23 annuity be purchased with an insurance company? 24 MR. ALDER: Right. And annuities are 25 renewable from year to year. There's no reason that</p> <p style="text-align: right;">Page 51</p>	<p>1 MR. ALDER: What happens? 2 MR. GILL: Yeah. 3 MR. ALDER: What happens, it gets paid back. 4 I mean, nobody on the Division side is saying that this 5 money is held by somebody and doesn't go back to Genwal 6 if this problem is resolved in some other manner. And 7 there are other alternative mannered ways that this 8 problem might be resolved. But, and at the present time 9 there isn't a resolution except the treatment system, so 10 that has to be bonded. But we're not saying that, I 11 mean, I think in thinking about the idea of perpetuity 12 and an annuity, you sort of maybe start in your mind 13 thinking this is going to be something like a college 14 fund that's held by somebody and it's stuck there. 15 That's not necessarily what has to happen and that's not 16 what we're asking. 17 CHAIRMAN JOHNSON: Could I follow up? 18 MR. GILL: Yeah. Because I wanted to start 19 the ball rolling but if I can, if I could ask further 20 questions -- 21 CHAIRMAN JOHNSON: Yeah, let me follow up 22 along those same lines, Mr. Alder. If I understand this 23 timeline correctly, if Genwal had just gone along and 24 complied with everything that the Division had placed in 25 its order, this financial instrument would be in place</p> <p style="text-align: right;">Page 53</p>

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<p>1 now, right?</p> <p>2 MR. ALDER: That's correct.</p> <p>3 CHAIRMAN JOHNSON: Okay. And I'm concerned if</p> <p>4 that had happened and this instrument were in place,</p> <p>5 what rules would administer or govern the oversight or</p> <p>6 the maintenance of that financial arrangement? You</p> <p>7 said, your exact words weren't these, but if the</p> <p>8 discharge water, iron concentration had dropped below</p> <p>9 one milligram per liter, there'd be no reason to have</p> <p>10 this trust fund in place anymore. So the money would be</p> <p>11 given back. Okay?</p> <p>12 Does that mean after the first monthly sample</p> <p>13 where the iron level is below one milligram, it would go</p> <p>14 back? Does it take two months' worth of readings, does</p> <p>15 it take six months? What rules govern at the point in</p> <p>16 time in which the money would be refunded or given back</p> <p>17 to Genwal?</p> <p>18 The main thrust of my questions is does the</p> <p>19 State have rules in place that would govern this</p> <p>20 situation and where we're talking about a large</p> <p>21 expenditure, it seems to me the rules need to be in</p> <p>22 place because there's a lot of money involved and things</p> <p>23 could change. So go ahead, Mr. Alder.</p> <p>24 MR. ALDER: I think, again, the assumption</p> <p>25 that you're making and perhaps we're all kind of got our</p> <p style="text-align: right;">Page 54</p>	<p>1 CHAIRMAN JOHNSON: Okay.</p> <p>2 MR. ALDER: Let me, to address that question I</p> <p>3 think you need to look at the actions that the Division</p> <p>4 took and its issuing Division Order 10A and I think what</p> <p>5 you will see is that, first of all, there were some</p> <p>6 violations above the iron limit and then the Division</p> <p>7 noticed that those concentrations stayed above the</p> <p>8 permitted level consistently, then they dealt with ways</p> <p>9 to treat it, and then they did their own hydrologic</p> <p>10 evaluation to determine the probability of that</p> <p>11 continuing in the long term and then they issued the</p> <p>12 Division order.</p> <p>13 The reason is that the rules require</p> <p>14 protection of the material damage as well as require</p> <p>15 protection of the hydrologic -- from material damage,</p> <p>16 they require avoiding violation of the Clean Water Act,</p> <p>17 but one violation of the Clean Water Act happens</p> <p>18 occasionally at a mine but that doesn't invoke a</p> <p>19 Division order. So the same thing would happen in</p> <p>20 reverse.</p> <p>21 If there was a situation where it appeared</p> <p>22 that things are trending down and that these levels are</p> <p>23 going to go away, I think the Division would do a</p> <p>24 hydrologic evaluation, they'd look at the numbers and</p> <p>25 they'd make a determination that the probable damage</p> <p style="text-align: right;">Page 56</p>
<p>1 heads into is that this will be something like Tennessee</p> <p>2 or Pennsylvania has enacted where they have come up with</p> <p>3 an acid mine drainage problem that has existed and has</p> <p>4 been there ever since for a long time and they set up a</p> <p>5 trust fund.</p> <p>6 That is in the Division order as an option but</p> <p>7 the Division order says there will be a bond, trust</p> <p>8 fund, or other financial instrument to provide the</p> <p>9 necessary security. So in answer to the first part of</p> <p>10 your question, it's not necessary under the statute or</p> <p>11 the rules and, in fact, Genwal would argue we don't have</p> <p>12 anyplace in there that talks about a trust fund, maybe</p> <p>13 we shouldn't even do that but all that is required is</p> <p>14 that there be a bond or surety. And a bond or surety is</p> <p>15 kept for this kind of problem, the same as it's kept for</p> <p>16 any other kind of problem.</p> <p>17 And, I think, and what I mean by that is it</p> <p>18 can be in escrow, it can be a surety with a corporate</p> <p>19 surety, but the control of that money goes back to the</p> <p>20 person who establishes that surety or that escrow, once</p> <p>21 the conditions have been satisfied.</p> <p>22 CHAIRMAN JOHNSON: So you're saying that the</p> <p>23 first sample that came back where water was below --</p> <p>24 MR. ALDER: No. I haven't got to that</p> <p>25 problem.</p> <p style="text-align: right;">Page 55</p>	<p>1 that had been predicted is not going to occur, and the</p> <p>2 bonding issue could be resolved that way by returning</p> <p>3 the amount or reducing the amount of the bond to just</p> <p>4 cover the cost of reclaiming the treatment area and</p> <p>5 facilities.</p> <p>6 This is a response to a problem that has been</p> <p>7 evaluated scientifically and carefully and consistent</p> <p>8 with the rules and it's going to go away the same way.</p> <p>9 If it never goes away, then the option will be</p> <p>10 to establish a trust, perhaps.</p> <p>11 CHAIRMAN JOHNSON: So I'm trying to understand</p> <p>12 the actual mechanics of being involved is. I think you</p> <p>13 said if the trend shows that the problem is going to go</p> <p>14 away, the bond or the trust fund could be done away</p> <p>15 with.</p> <p>16 MR. ALDER: Well, Mr. --</p> <p>17 CHAIRMAN JOHNSON: And --</p> <p>18 MR. ALDER: I'm really not the right person to</p> <p>19 answer that.</p> <p>20 CHAIRMAN JOHNSON: Okay.</p> <p>21 MR. ALDER: The Division would have to make an</p> <p>22 evaluation and what I'm trying to say is they would use</p> <p>23 their science or they would use their judgment.</p> <p>24 CHAIRMAN JOHNSON: And I think you are the</p> <p>25 right person to answer my question because my question</p> <p style="text-align: right;">Page 57</p>

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<p>1 goes back to what rules are in place, what rules does 2 the State of Utah have that govern this situation? 3 Surely you're not going to leave it up to the 4 hydrologist to decide whether or not the money should be 5 refunded. 6 MR. ALDER: No. No. 7 CHAIRMAN JOHNSON: What I'm concerned about is 8 the amount of money we're talking about, what rules are 9 in place to govern or to manage the administration of 10 this fund, are there rules in place? 11 MR. ALDER: Well, we are not saying that you 12 need any special rule to deal with this particular type 13 of bonding and the rules that are in place for release 14 of the bond say that the bond will be released when the 15 reclamation has been completed, including in the release 16 provision, is the language that says that if there are 17 water pollution problems, the cost of dealing with those 18 water pollution problems and the extent and duration of 19 those water pollution problems will be used to determine 20 whether or not bonding is required to remain in place 21 and how much. 22 So there is that rule already in place and 23 it's in the statute, and the fact that, primarily under 24 coal mining reclamation sureties and bonds we're dealing 25 with land reclamation, it doesn't mean that those same</p> <p style="text-align: right;">Page 58</p>	<p>1 a time. 2 A surety bond, is there any surety company 3 that would issue a surety bond for this situation? 4 MR. ALDER: I'm advised that it's difficult to 5 get a surety bond that essentially takes care of an 6 annuity situation, but that doesn't mean that for the 7 term of the mining permit, which is renewed every five 8 years, you could do a surety bond for a fixed amount of 9 money for that five years and all bonds are renewable 10 and are adjustable. 11 CHAIRMAN JOHNSON: Five years is not in 12 perpetuity. 13 MR. ALDER: No. But -- 14 MR. GILL: If it's a variable payout you 15 probably can't get a surety bond but they'll give you a 16 variable. If it's a fixed payout then you could get a 17 surety bond. 18 CHAIRMAN JOHNSON: Okay. Could it be a 19 collateral bond? Aren't collateral bonds to the amount 20 that could be insured by the FDIC? 21 MR. ALDER: No. 22 CHAIRMAN JOHNSON: They're not? So it could 23 be a collateral bond. The Division could accept a 24 financial instrument -- 25 MR. PAYNE: If it's cash.</p> <p style="text-align: right;">Page 60</p>
<p>1 rules don't work and can't be applied to a water 2 problem. 3 CHAIRMAN JOHNSON: Okay. Let me ask my second 4 question. I mean, this is a bond, you keep calling it a 5 bond. 6 MR. ALDER: Yes, sir. 7 CHAIRMAN JOHNSON: Rule 860 defines the three 8 types of reclamation bond that the Division can approve 9 or accept. So would this situation be a surety bond, a 10 collateral bond, or a self-bond? 11 MR. ALDER: Well, it could be any of those. 12 CHAIRMAN JOHNSON: Well, if it were a 13 self-bond, that means that the company would just say, 14 "Well, we're good for the money." 15 MR. ALDER: Utah doesn't do self-bonding, 16 thank goodness, but it's allowed; it's allowed under the 17 rules. 18 CHAIRMAN JOHNSON: Well, would it be -- could 19 it be allowed in this situation? 20 MR. ALDER: I suppose it could. 21 MR. HAROUNY: Isn't there certain financial 22 criteria? 23 MR. ALDER: Yeah, there are financial 24 criteria, things that would have to be met. 25 CHAIRMAN JOHNSON: So, let's take them one at</p> <p style="text-align: right;">Page 59</p>	<p>1 MR. ALDER: Cash. 2 MR. PAYNE: Cash is FDIC. 3 MR. ALDER: Cash is part of the collateral 4 bond. We had a property bond as a collateral bond on a 5 mine in Utah perviously, under the provisions for 6 collateral bonds but if it's money in a bank, yes, it 7 has to be in a federally insured account, and that's 8 limited to a certain amount. 9 We have bonds in amount in excess of that 10 amount that are held in federal securities that are held 11 in escrow by a bank. So, for example, we have a 12 couple-million-dollar bond that consists of federal 13 notes that are rolled over periodically but they're held 14 in escrow, so the dollar amount doesn't affect that kind 15 of bonding. 16 CHAIRMAN JOHNSON: Okay. In the order and in 17 some of the correspondence from the Division I've seen 18 this called a trust fund. 19 MR. ALDER: Yes. 20 CHAIRMAN JOHNSON: Are there rules that govern 21 how a trust fund would be set up and how it would be 22 maintained? 23 MR. ALDER: No. 24 CHAIRMAN JOHNSON: Okay. So it really 25 couldn't be a trust fund.</p> <p style="text-align: right;">Page 61</p>

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<p>1 MR. ALDER: Right.</p> <p>2 CHAIRMAN JOHNSON: All right. It would have</p> <p>3 to be a bond.</p> <p>4 MR. ALDER: I guess I said you're right too</p> <p>5 fast. In the Tennessee rule they said that under the</p> <p>6 existing statute and program that a trust fund didn't</p> <p>7 require additional rulemaking but I have to concede that</p> <p>8 that trust fund doesn't fit into one of the categories.</p> <p>9 It could be an escrow, though, I suppose.</p> <p>10 CHAIRMAN JOHNSON: Okay. That would be an</p> <p>11 interest earning account?</p> <p>12 MR. ALDER: Yes. It would have to be.</p> <p>13 CHAIRMAN JOHNSON: It has to be --</p> <p>14 MR. ALDER: Yes.</p> <p>15 CHAIRMAN JOHNSON: -- to meet the definition</p> <p>16 of what the Division required.</p> <p>17 MR. ALDER: In order to meet the requirements.</p> <p>18 CHAIRMAN JOHNSON: And this is my last</p> <p>19 question. If this instrument were set up and it earned</p> <p>20 interest or was paid as an annuity, to pay out the</p> <p>21 \$325,000 a year that the Division thinks is necessary,</p> <p>22 if that were set up and Genwal continues to operate the</p> <p>23 treatment plant so that there's no expenditure from this</p> <p>24 fund or bond required on an annual basis, Mr. Allen</p> <p>25 asked this before, what is done, then, with the money</p> <p style="text-align: right;">Page 62</p>	<p>1 to worry about it while it's being treated. It doesn't</p> <p>2 need to be adjusted for costs, I don't think.</p> <p>3 Afterwards it does but not during operation.</p> <p>4 CHAIRMAN JOHNSON: I'm not sure I understand</p> <p>5 your answer. But the way I have it pictured in my mind</p> <p>6 is that a financial instrument would be set up that</p> <p>7 would pay out \$325,000 per year.</p> <p>8 MR. ALDER: No.</p> <p>9 CHAIRMAN JOHNSON: And that --</p> <p>10 MR. ALDER: The financial --</p> <p>11 CHAIRMAN JOHNSON: I'm not correct?</p> <p>12 MR. ALDER: That's not correct. A bond has to</p> <p>13 be established in an amount that is capable of paying</p> <p>14 out \$325,000 per year in the event of a default. I'll</p> <p>15 use that word.</p> <p>16 MR. JENSEN: Excuse me.</p> <p>17 CHAIRMAN JOHNSON: Okay.</p> <p>18 MR. JENSEN: Don't you have to assume,</p> <p>19 everybody agrees you can't buy a bond, it's not</p> <p>20 available. So you're talking about having to fund and</p> <p>21 you're not going to have it just sit there, it is going</p> <p>22 to start to earn interest --</p> <p>23 MR. ALDER: Yes. Yes.</p> <p>24 MR. JENSEN: I mean, isn't that the reality?</p> <p>25 MR. ALDER: Yeah. And I don't think there's</p> <p style="text-align: right;">Page 64</p>
<p>1 that's earned on this account? And, again, my question</p> <p>2 goes back to are the rules in place that would establish</p> <p>3 what is done?</p> <p>4 MR. ALDER: As to whether there are rules in</p> <p>5 place that establish what is done, off the top of my</p> <p>6 head I may not be thinking of everything, but I'd say</p> <p>7 there probably aren't any but in answer to your</p> <p>8 question, I think the liability is a fixed amount that</p> <p>9 is estimated as of the date that treatment stops.</p> <p>10 So if every year Genwal continues to operate</p> <p>11 the plant and to treat it, then the uncertain question</p> <p>12 of risk and liability to the State is a fixed amount</p> <p>13 which just, you know, you may have to adjust it from</p> <p>14 time to time as inflation or other costs go into place,</p> <p>15 but it doesn't have to be modified because, in fact, you</p> <p>16 would assume that it's not going on, it's just a</p> <p>17 precaution and it's going to stay at that amount as long</p> <p>18 as it's treated year to year.</p> <p>19 But in the event Genwal closes shop and says,</p> <p>20 "You know what, we're not responsible for that</p> <p>21 subsidiary corporation's liabilities, we're out of</p> <p>22 here," then that amount of money, which has been</p> <p>23 calculated based on the cost, an amount necessary to</p> <p>24 meet that 325,000 or whatever it turns out to be, is</p> <p>25 there to take over responsibility. But you don't have</p> <p style="text-align: right;">Page 63</p>	<p>1 any, I think in answer to Mr. Johnson's question, then,</p> <p>2 the owner of the fund is entitled to interest that it</p> <p>3 earns because it doesn't need to increase.</p> <p>4 MR. JENSEN: So the answer is 325,000 would</p> <p>5 revert to Genwal.</p> <p>6 MR. ALDER: Right.</p> <p>7 MR. JENSEN: Because you didn't use it and you</p> <p>8 don't need it for that year.</p> <p>9 MR. ALDER: That's correct.</p> <p>10 MR. JENSEN: Isn't that the effect</p> <p>11 mechanically?</p> <p>12 THE WITNESS: Yes.</p> <p>13 MR. PAYNE: Although, I would disagree with</p> <p>14 that because that 325,000 is going to inflate at an</p> <p>15 annual year on year so you're going to have to fund</p> <p>16 that.</p> <p>17 MR. JENSEN: But you take care of that in</p> <p>18 terms of periodic adjustments to the bond going forward.</p> <p>19 MR. ALDER: And it may go down.</p> <p>20 MR. JENSEN: In this instance, excuse me, the</p> <p>21 deposit amount going forward.</p> <p>22 CHAIRMAN JOHNSON: Go ahead, Mr. Harouny.</p> <p>23 MR. HAROUNY: But still the question is at</p> <p>24 what point in time do you think the adjustment needs to</p> <p>25 be made not for inflation purposes but from actual iron</p> <p style="text-align: right;">Page 65</p>

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<p>1 content or other -- is the iron the only contaminant 2 you're worried about -- 3 MR. ALDER: Yes. 4 MR. HAROUNY: -- or are there other agents, as 5 well? 6 MR. ALDER: As I understand it, it's just 7 iron. 8 MR. HAROUNY: Just iron? 9 MR. ALDER: Yes. 10 MR. HAROUNY: And how has it been -- are there 11 a series of ponds, settling ponds right now that it's 12 going through? 13 MR. ALDER: You know, that's a really 14 complicated question and has had a lot of different 15 answers over the time and I'm not sure the current 16 answer that I would give would be correct and I think we 17 just have to say it's a chemical treatment system, it's 18 not just a -- 19 MR. HAROUNY: I am -- I'm interested in -- in 20 actual reclamation of the ponds, themselves, or the 21 actual mine operations. I may have heard wrong but 22 Ms. Dragoo mentioned that the company may go back into 23 the mines -- 24 MR. ALDER: Yes. 25 MR. HAROUNY: -- properly so that the mine,</p> <p style="text-align: right;">Page 66</p>	<p>1 MR. HAROUNY: Oh, so, the actual water flow 2 started way before that. 3 MS. DRAGOO: Yeah. 4 MR. HAROUNY: But the iron content increased, 5 was that as a result of that explosion or did that occur 6 prior to before the explosion. 7 MS. DRAGOO: No, that was just recent and our 8 hydrologist prepared a report on that and believes that 9 -- 10 CHAIRMAN JOHNSON: We're going to get -- 11 MS. DRAGOO: -- this is also the mine water 12 flooding, being exposed to pyrite and then that has 13 produced -- 14 MR. HAROUNY: I'm just right now worried about 15 cross bonding and bonding on bonding and, et cetera, 16 et cetera, issues that may already be covered or not. I 17 just want to make sure -- 18 MR. ALDER: There won't be cross bonding but I 19 think if you want answers to those questions, we need to 20 get to the next hearing and there's a lot of information 21 on all of those questions and they're good questions. 22 It's just that the first question is, Are we entitled to 23 look to Genwal for security at this time for the costs 24 of treatment as a precaution of them not continuing to 25 treat the water?</p> <p style="text-align: right;">Page 68</p>
<p>1 itself, is under bond, correct, has a reclamation bond? 2 MR. ALDER: Yes. 3 MS. DRAGOO: Correct. 4 MR. HAROUNY: So where does this fit into the 5 reclamation bond in regards to the mine operations? 6 Isn't water flow and water contamination -- are any kind 7 of contaminants coming from the mine included in that 8 bond? 9 MR. ALDER: Not currently. And I think the 10 reason is that it was designed to not have gravity 11 discharge and at the time that they were pumping, there 12 was not a water-quality problem. This is not an 13 anticipated event. 14 MR. HAROUNY: So this could be as a result of 15 the explosion, correct? 16 MR. ALDER: Could be. 17 MR. HAROUNY: Could be. Is there any kind of 18 insurance issues here at play, tying this situation with 19 a actual explosion? 20 CHAIRMAN JOHNSON: Collapse. 21 MS. DRAGOO: I do not think there's any 22 evidence of that. Excuse me. This discharge, the 23 mine-water discharge, itself, was occurring in the 1990s 24 prior to the tragic incidence on August 16 of 2007. 25 So --</p> <p style="text-align: right;">Page 67</p>	<p>1 Can I ask the court's indulgence? 2 (Discussion off the record.) 3 Could I have, like, two minutes? 4 CHAIRMAN JOHNSON: Yes. 5 (Discussion off the record.) 6 CHAIRMAN JOHNSON: We'll go off the record 7 now. 8 (Recess taken.) 9 CHAIRMAN JOHNSON: Okay. Let's go back on the 10 record. Mr. Harouny, were you still asking questions? 11 MR. HAROUNY: Yes. 12 CHAIRMAN JOHNSON: Can we have everyone's 13 attention, please? 14 Thank you. 15 MR. HAROUNY: The reason I was asking 16 questions was because I was trying to get at two issues 17 here. You have a variable issue, which is the water 18 flow and the amount of contaminants that vary from day 19 to day and then you have a fixed issue, which has to do 20 with the ponds, and the way you're treating it and the 21 facilities, et cetera, et cetera, which I believe is not 22 bonded at this point in time or is it? 23 MR. JENSEN: It's not. 24 MR. HAROUNY: Reclamation of the treatment 25 facilities, reclamation of the ponds, et cetera,</p> <p style="text-align: right;">Page 69</p>

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<p>1 et cetera. So you're dealing with this -- we're focused 2 on one thing and say: "Okay. We're going to take care 3 of the variable, which is the water treatment, and the 4 water flow, and here's the operating cost and here's how 5 much it's going to cost to treat this," but once this 6 thing is done someone would have to reclaim, say Genwal 7 is up and gone and the State treats it and for some 8 reason or another is able to stop the water flow, then 9 the facilities would have to be reclaimed. So how are 10 we going to deal with that situation; is that going to 11 be included in the bond -- the amount of bond or not? 12 MS. DRAGOO: Mr. Harouny, this was corrected 13 by David Gibbs who confirmed that the water treatment 14 facilities -- 15 MR. JENSEN: Can you speak a little louder, 16 please? 17 MS. DRAGOO: -- the ponds are included in the 18 current reclamation bond. 19 MR. HAROUNY: In the current mine reclamation 20 bond? 21 MS. DRAGOO: Yes, mine reclamation bond. 22 MR. ALLEN: Yes. So the bond has been 23 adjusted once to account for the surface effects of the 24 treatment facilities including the pond. 25 MR. ALDER: I'm sorry. I didn't understand.</p> <p style="text-align: right;">Page 70</p>	<p>1 variables like our discussion today, I think, 2 illustrates that. 3 CHAIRMAN JOHNSON: Thank you, Mr. Allen. 4 Mr. Payne. 5 MR. PAYNE: And my question actually goes to 6 that in some respect and to Mr. Alder here. First, let 7 me ask this question: So you've asked Genwal to provide 8 surety to the Division, payable to the Division in an 9 amount sufficient to meet or to provide \$325,000; is 10 that correct? 11 MR. ALDER: In perpetuity. 12 MR. PAYNE: In perpetuity. How would the 13 Division judge the adequacy of that amount of bond, by 14 what standard? 15 MR. ALDER: I think we would employ experts 16 and financial people who could give us, to some degree, 17 a certainty how that annuity would be set up. I mean, 18 what the amount would be? I can't tell you that we have 19 in-house ability to do that. But I'm not sure that a 20 rule is going to do much more than that. 21 If you look at the Tennessee rule and the 22 portion in the Federal Register where they talk about 23 the implementation of that rule, they discuss exactly 24 this process. And they say, first of all, they'd employ 25 experts to look at the nature of the discharge, the</p> <p style="text-align: right;">Page 72</p>
<p>1 If that was your question, that is correct. 2 MR. HAROUNY: Yeah, that was my question. 3 CHAIRMAN JOHNSON: Mr. Payne, do you have 4 questions? 5 MR. ALLEN: Mr. Chairman, may I address your 6 question for a minute, before we -- 7 CHAIRMAN JOHNSON: Go ahead, Mr. Allen. 8 MR. ALLEN: This exercise in imagination -- 9 this exercise in imagination we're going through to 10 think about how the financial instrument might work and 11 how bond release or bond adjustment might work, I think 12 is a really productive exercise for an agency that's 13 trying to implement an alternative bonding system. Now, 14 as I mentioned under the federal act, alternative 15 bonding systems are authorized. 16 If the State finds that the use of surety 17 bonds and self-bonds and collateral bonds doesn't meet 18 their objectives, they can go ahead under the federal 19 act and implement other systems and that's what 20 Pennsylvania's done, that's what West Virginia has done, 21 and that's what the Office of Surface Mining did for the 22 state of Tennessee. But in each of those cases that was 23 done through additional lawmaking and that's really the 24 point here is that to attempt to do all of this ad hoc 25 becomes just an unmanageable question of numerous</p> <p style="text-align: right;">Page 71</p>	<p>1 extent, the type of treatment, and those types of 2 questions. 3 MR. PAYNE: I'm talking about the economic 4 side of this. 5 MR. ALDER: I know. I intend -- 6 MR. PAYNE: Okay. 7 MR. ALDER: And the second part of that rule, 8 right after that then it says the next thing it says 9 they would consult with the operator and say, What kind 10 of operation -- and this is under an alternative system 11 where they say, "What kind of bond do you want to put 12 up? What kind of arrangement do you want to put in 13 place?" And they would say, "Well, we want to do a 14 trust fund." 15 And so then the rule says, and I can refer you 16 to the page, then they would consult financial experts 17 and they have a computer program that they referenced in 18 this rule, said that they would refer to that computer 19 program as part of their consultation to assess. None 20 of that's part of the rule. That's just the procedure 21 that they would use to implement the alternative. All 22 the rule says is, "As an alternative, they can use a 23 trust fund." And I think that the Division would have 24 to do something similar. 25 MR. PAYNE: I guess where I struggle is the</p> <p style="text-align: right;">Page 73</p>

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<p>1 notion that your going to get your costs to agree. If 2 you look at a risk-free rate and all the assumptions 3 that would go into calculating a risk-free rate, which 4 would be necessary to calculate an annuity, I mean, I've 5 recently seen the State of Alaska say a 5.5 risk-free 6 rate is fine. That puts this bond around -- bond amount 7 down around \$7 million.</p> <p>8 Now, there's a huge difference between 9 7,000,000 and a 30,000,000 that they have calculated. 10 It seems to me that it needs to be more ad hoc than just 11 saying, "We'll employ experts," and I guess you're 12 probably getting the sense that there's some discomfort 13 on this board that this didn't go through rulemaking. 14 So I'll put this question to you. What went into 15 the Division's decision, the Division's decision to not 16 seek rulemaking, which by, what would seem like a safer 17 harbor going forward in promulgating this, or requesting 18 this in general, to have those rules at your back and 19 not face the arbitrary and capricious accusations that 20 can come with regard to this approach?</p> <p>21 MR. ALDER: I think it's a good question and 22 it was a dilemma that the Division had to deal with 23 given its limited resources and the ongoing potential 24 for liability and risk that was not insured. I think 25 maybe Mr. Baza can address that, if you would allow</p> <p style="text-align: right;">Page 74</p>	<p>1 MR. ALDER: Well, my answer was 2 straightforward. I said, Yes, sir.</p> <p>3 CHAIRMAN JOHNSON: Okay. Mr. Harouny said 4 there's two years' worth of the operating costs sitting 5 in an account, you're saying that would be --</p> <p>6 MR. HAROUNY: That they can use for operating.</p> <p>7 MR. ALDER: Oh, I thought you said there would 8 be enough money in an account.</p> <p>9 CHAIRMAN JOHNSON: No, he said two years' 10 worth, I believe.</p> <p>11 MR. HAROUNY: Two years' worth of operating 12 costs sitting in an account that he can use for 13 operating while we go through rulemaking, we're covered.</p> <p>14 MR. ALDER: No. I think as the rule says, you 15 have to have adequate bonding in place at all times. It 16 has to be adequate surety in place at all times. And I 17 think that if it took two years and there was some sort 18 of temporary arrangement, that could be something that 19 could be worked out. Frankly, that was in January of 20 2008, kind of the direction the Division was heading but 21 we got a closed door and a do nothing or do something 22 option and we chose, given the limited resources and the 23 risk of liability to reevaluate the hydrologic 24 assumptions, concluded those hydrologic assumptions were 25 valid and severe and required action, and then we took</p> <p style="text-align: right;">Page 76</p>
<p>1 that. It's more of a management question. 2 Are you okay with that or not?</p> <p>3 MR. PAYNE: I think we're just going to have 4 counsel speak. I'm okay. I think my point's made. 5 Perhaps --</p> <p>6 MR. ALDER: Well, it is a good point and I 7 think that, as I say, the Division does not object to 8 proceeding with rulemaking. But if we say, "Let's 9 proceed with rulemaking," it'll be better, we'll have a 10 better idea how we're going to -- what options, 11 instruments are out there, how we're going to release 12 them and how we're going to calculate the amounts and 13 adjust the amounts.</p> <p>14 That's like a giant leap across the pond from 15 where we were when we issued Division Order 10 and we're 16 told there would be no bonding. If, in fact, bonding is 17 necessary and it is necessary with a rule, I think the 18 Division's fine with that.</p> <p>19 MR. HAROUNY: May I ask a question. So, 20 arbitrarily, if there's two years' operating costs 21 sitting in an account that they have the right to use 22 while this thing has gone through rulemaking, would that 23 be okay with you?</p> <p>24 MR. ALDER: Yes, sir.</p> <p>25 CHAIRMAN JOHNSON: Say that again, Mr. Alder.</p> <p style="text-align: right;">Page 75</p>	<p>1 the action that you have before you.</p> <p>2 MR. PAYNE: Can I finish?</p> <p>3 CHAIRMAN JOHNSON: Go ahead.</p> <p>4 MR. PAYNE: Mr. Alder, can I have -- you 5 skipped over this in your presentation. Could you walk 6 me through where the authority comes from in statute to 7 require this? I'm not challenging you. I'm just 8 struggling to understand it so I'd like to have a 9 roadmap drawn for me to make sure, you know, if 10 lawmaking is necessary, that would be a prerequisite to 11 rulemaking.</p> <p>12 MR. ALDER: So let me make sure I understand 13 the question. Where the provision is in the statute, 14 that would --</p> <p>15 MR. PAYNE: That would allow --</p> <p>16 MR. ALDER: -- authorize --</p> <p>17 MR. PAYNE: Yes.</p> <p>18 MR. ALDER: -- the rulemaking?</p> <p>19 MR. PAYNE: Would it authorize a rulemaking 20 around requiring bonding for long-term --</p> <p>21 MR. ALDER: Okay. I think anytime this board 22 wants to, it can establish rules to help implement the 23 statute and to expand upon as long as those rules are 24 consistent with the statute, and the purposes of the 25 statute. So if that's your question, I think it's up to</p> <p style="text-align: right;">Page 77</p>

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<p>1 the Division to choose it but as Tennessee said --</p> <p>2 MR. PAYNE: No, no, no. I'm wanting you to</p> <p>3 not quote Tennessee or -- or SMCRA. I want you to help</p> <p>4 me with Utah statute, just educate me here a little bit.</p> <p>5 I'm struggling with this point.</p> <p>6 MR. ALDER: I'll be glad to do that. The</p> <p>7 reason that Tennessee is nice is -- and the statute's</p> <p>8 the same, I mean, SMCRA is the same and they are -- do</p> <p>9 it pretty succinctly. But I believe I did this in the</p> <p>10 footnotes on the reply brief and I did it in the</p> <p>11 beginning of the argument.</p> <p>12 MR. PAYNE: Please walk me through that.</p> <p>13 MR. ALDER: What?</p> <p>14 MR. PAYNE: Please walk me through that?</p> <p>15 MR. ALDER: All right. All right. First of</p> <p>16 all, I'm not going to go through the requirements in the</p> <p>17 permit unless you want me to read through all of those.</p> <p>18 MR. PAYNE: No.</p> <p>19 MR. ALDER: That talk about you have to</p> <p>20 protect water quality and the mining operations. I</p> <p>21 don't think that's contested anymore. So -- and the</p> <p>22 same with the performance standards. The performance</p> <p>23 standards say that you have to protect the water quality</p> <p>24 before and after mining, and I don't think that's</p> <p>25 contested.</p> <p style="text-align: right;">Page 78</p>	<p>1 permit to protect hydrology before and after mining,</p> <p>2 that's a legitimate basis for determining the amount of</p> <p>3 the bond.</p> <p>4 Again, we get back to the last part of that</p> <p>5 same statute, so under 40-1015.5, it says, "The amount</p> <p>6 of the bond, surety, or deposit required as the terms</p> <p>7 shall be adjusted by the Division from time to time as</p> <p>8 affected land acreages are increased or decreased or</p> <p>9 where the cost of future reclamation changes." So from</p> <p>10 that you need to go, probably, to the rules, which --</p> <p>11 MR. PAYNE: Okay.</p> <p>12 MR. ALDER: -- talk about the reclamation</p> <p>13 plan, but I'll take you to one other spot. And the</p> <p>14 other spot is --</p> <p>15 MR. PAYNE: Well, let me --</p> <p>16 MR. ALDER: -- where it talks about release of</p> <p>17 the bond in the next section. Go ahead.</p> <p>18 MR. PAYNE: Well, I was going to stop you at</p> <p>19 40-1015 and ask you what the effect of paragraph -- or</p> <p>20 section 2 there is, about the duration.</p> <p>21 MR. ALDER: Yeah. Okay. And that was cited</p> <p>22 by the -- when we first started down this road and there</p> <p>23 seemed to be great resistance to any bonding, that</p> <p>24 statutory language was cited. And it does sort of just</p> <p>25 stand out as saying that the duration of the bond is</p> <p style="text-align: right;">Page 80</p>
<p>1 MR. PAYNE: Okay.</p> <p>2 MR. ALDER: So when you get to the bonding</p> <p>3 amount, the amount is called for in 40-1015.1 and, first</p> <p>4 of all, the strongest statement is that the bonding has</p> <p>5 to be sufficient to require compliance with all of</p> <p>6 the -- to ensure compliance with all of the requirements</p> <p>7 of the permit and the act.</p> <p>8 MR. PAYNE: Right. I see. I read that. So</p> <p>9 you're saying there's that requirement there and you're</p> <p>10 saying all the requirements then points back to the</p> <p>11 requirements statute to protect water quality.</p> <p>12 MR. ALDER: That's correct. And then further</p> <p>13 down in that same paragraph, about two full sentences</p> <p>14 below that, it says, "The amount of bond required for</p> <p>15 each bonded area shall depend on the reclamation</p> <p>16 requirements of the permit, shall reflect the probable</p> <p>17 difficulty of reclamation, giving consideration to such</p> <p>18 factors as topography, geography of the site" -- I mean,</p> <p>19 "geology of the site," excuse me -- "hydrology,</p> <p>20 revegetation potential as shall be determined by the</p> <p>21 Division. "</p> <p>22 Now, granted that's a tangential throw of a</p> <p>23 big general term, but hydrology concerns are a</p> <p>24 legitimate question and given the requirements in the</p> <p>25 previous section in the performance standards in the</p> <p style="text-align: right;">Page 79</p>	<p>1 limited to revegetation. And it gives the Division</p> <p>2 pause, but if, as I interpret that, has to be read</p> <p>3 consistent with the provisions in the next section, the</p> <p>4 next statute, that talks about release of the bond.</p> <p>5 Because whatever the duration is, you know, the initial</p> <p>6 duration, whatever you plan for the duration of that</p> <p>7 bond to be, may be limited -- if you do it right and you</p> <p>8 don't plan for a mine that's going to be unanticipated</p> <p>9 post-mining drainage, so you don't have that uncertainty</p> <p>10 or perpetual issue out there then, of course, that is</p> <p>11 the natural duration of the bond, when you finish</p> <p>12 reclamation.</p> <p>13 But you have to go to the release of the bond</p> <p>14 and this is where it comes back in and pulls the</p> <p>15 performance standards and the permit requirements under</p> <p>16 the control of the bond and that says, if you look at</p> <p>17 section 3 of 40-1016, the last sentence says, "No bond</p> <p>18 shall be fully released until all reclamation</p> <p>19 requirements of this chapter are finally met."</p> <p>20 And above that it's even stronger. It says --</p> <p>21 this is when somebody comes in and they apply, so in</p> <p>22 answer to your question about how do we get out of this</p> <p>23 situation, the applicant comes it and applies because we</p> <p>24 want our bond released.</p> <p>25 And the Division makes an evaluation, that's</p> <p style="text-align: right;">Page 81</p>

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<p>1 required by this statute. It says, "The evaluation 2 shall consider, among other things, the degree of 3 difficulty to complete any remaining reclamation." This 4 is the important part, "Whether pollution of surface and 5 subsurface water is occurring, the probability of 6 continuance of further occurrences of water pollution -- 7 and the pollution and the estimated cost of abating the 8 pollution." 9 That's the strongest language in the statute 10 out there that says, notwithstanding what it says in the 11 previous section about durations until revegetation, the 12 bond has to be -- can't be released unless you consider 13 water pollution, costs, and duration. 14 MR. PAYNE: Okay. At the beginning of that 15 wording, 1016 says, "The Division shall adopt and 16 promulgate rules providing for the release." 17 MR. ALDER: Yes, sir. 18 MR. PAYNE: So I guess it's going to 19 Mr. Johnson's question. The last question I have for 20 you is you've referred to this Tennessee rulemaking and 21 this Fed Register notice. What weight should this board 22 put on this? I mean, is this merely the opinions of OSM 23 counsel? 24 MR. ALDER: Yes, it is probably that. 25 MR. PAYNE: Okay.</p> <p style="text-align: right;">Page 82</p>	<p>1 rule, as I understand it, initially was going to include 2 a question -- or the material damage rule, that's what 3 it was, was going to include a rule about bonding for 4 water -- long-term bonding. 5 But we made inquiries after your question and 6 they said no, that was no longer part of the proposed 7 rulemaking and then somebody said, "Well, it might be, 8 but it isn't now," and they basically said, you know, 9 it's going to be a couple of years before they finish 10 that rule, I think. So that particular very recent 11 initial rulemaking is related to a very specific problem 12 of mountaintop mining, as I understand it. 13 But this statement here, I don't think, you 14 know, it's pretty current. It's 1995 and, I mean, 2007, 15 sorry. 16 I can see how current I am, 1995's current. 17 It's 2007 and I think it's the current 18 position of OSM that rulemaking isn't necessary. 19 MR. PAYNE: Thank you, Mr. Alder. 20 CHAIRMAN JOHNSON: Any other questions from 21 the board? 22 MR. ALLEN: Mr. Chairman, may I address 23 Mr. Payne's questions for a minute? 24 CHAIRMAN JOHNSON: Go ahead, Mr. Allen. 25 MR. ALLEN: Mr. Payne hit upon the fundamental</p> <p style="text-align: right;">Page 84</p>
<p>1 MR. ALDER: I mean, first of all, it's the 2 very considered opinions -- 3 MR. PAYNE: Considered opinions. 4 MR. ALDER: -- of OSM's counsel that has 5 directed and guided their actions in face of much more 6 common and more serious problems of the same nature Utah 7 has and I think it's sound argument and certainly not a 8 court that's compelling this board to decide one way or 9 another. 10 MR. PAYNE: And then any comments that this 11 Federal Register notice noted that the national 12 rulemaking was not necessary, yet I understand national 13 rulemaking is assumed to be -- 14 MR. ALDER: No. You know, and you asked that. 15 MR. PAYNE: I asked that because I heard that 16 directly from the Division or OSM director. 17 MR. ALDER: Right. And I think that we 18 responded to your question by letter in the first round 19 of briefing, there were a little bit like passing in the 20 night because we were addressing the question that you 21 had, which is currently there's a mountaintop mining 22 rule that's under consideration -- 23 Am I speaking correctly, Dana, on this? 24 MS. DEAN: I'm sorry? 25 MR. ALDER: And part of the mountaintop mining</p> <p style="text-align: right;">Page 83</p>	<p>1 question here, which is where is it written that the 2 Division is authorized to require a bond of this type 3 for this purpose? The fallacy in the Division's 4 argument is the Division's assumption that the statute 5 provides that anything that the coal program requires 6 may also be bonded for. As I said, the coal program has 7 lots of requirements and then there's a much narrower 8 subset of the activities for which an operator is 9 required to post a bond. 10 Turning to the language of 40-1015, the 11 language says that, "The operator shall post a bond for 12 performance payable to the State and the United States, 13 if appropriate, which is conditioned upon faithful 14 performance of all the requirements of this act." There 15 are two issues, what performance are we bonding for and 16 what are the conditions of the bond? 17 I go to a surety on behalf of my client and 18 ask for a bond, the first thing they want to know is how 19 much, what kinds of things am I as the surety going to 20 be required to pay for if you default? And the answer 21 in that question is paying for reclamation, which is 22 restoration of the surface of the land in the permit 23 area sufficient for its post-mining land use. 24 And the next question the surety will ask is, 25 "What are the conditions of this bond?" And the answer</p> <p style="text-align: right;">Page 85</p>

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<p>1 to that question is faithful performance upon -- of all 2 of the requirements of the act. In other words, we bond 3 for the subset but release of that bond is conditioned 4 upon the whole set. And that's the way the law is 5 structured to assure that operators fulfill all of their 6 duties. And that brings us to the question of bond 7 release.</p> <p>8 I mean, bond release can be conditioned upon 9 things that are not bonded for. I think that's the 10 point and that's the fallacy here is that the Division 11 is really conflating these two points of what activities 12 do we bond for and what things is the bond conditioned 13 upon, and they're really two separate issues.</p> <p>14 MR. ALDER: Well, but they aren't to the 15 surety because if the surety can't get his money back 16 under the bond release because there's a water pollution 17 problem, he's not going to turn to the operator and say, 18 "Well, wait, wait, wait a second. I just bonded for 19 vegetation, give me my money back." The act is very 20 clear. All of the requirements of the permit and the 21 chapter, the act.</p> <p>22 And so I don't think that's a fair analogy and 23 I think, and I realize I'm stepping over slightly but 24 Mr. Allen previously made a response, an argument that I 25 didn't respond to which is that, you know, we don't have</p> <p style="text-align: right;">Page 86</p>	<p>1 nothing needed you don't have to worry about how the 2 bond is released or anything else. They get the money. 3 Their obligation is met under this financial assurance.</p> <p>4 And I would refer you to this document, which 5 is the Tennessee Regulatory Program Final Rule and I 6 would refer you to Page 9619, the center column, where 7 it says, "We anticipate that a fully funded trust or 8 annuity may include provisions for payment to the 9 permittee as a mechanism to cover the cost of water 10 treatment, especially for those permittees no longer 11 generating income from the mining of coal. Payments 12 from the income stream gross, out of a fully funded 13 trust fund or annuity will not be considered a bond 14 release or a bond forfeiture."</p> <p>15 There's a mechanism there already anticipated 16 and whether you call it a bond, which covers the three 17 categories that the chairman mentioned, or a financial 18 assurance, which I believe is the intent of the 19 legislature under the statute I referred to earlier, 20 which is the generic, cover all costs, I think that is 21 something that ought to be within the mix.</p> <p>22 MR. HAROUNY: That was exactly, precisely, 23 what I suggested, but I suggested for two years.</p> <p>24 MR. GILL: And it can be for two years, it can 25 be for a longer period, and it can be developed by</p> <p style="text-align: right;">Page 88</p>
<p>1 to bond for this kind of stuff. We bond for land 2 problems.</p> <p>3 But there's a big difference between other 4 things, other operational obligations that a coal 5 operator has. When the coal mining stops, the air 6 pollution stops. When the coal mining stops, other 7 continuing impacts stop, but when the coal mining stops 8 and you have an unanticipated post-mining pollution 9 discharge that's going to continue for a long, long 10 time, that's exactly the same thing as having an 11 unreclaimed mountainside that's going to continue to 12 contribute problems.</p> <p>13 So I don't think -- I think the fact is it is 14 the kind of problem that's covered by bonding and by the 15 act.</p> <p>16 CHAIRMAN JOHNSON: Mr. Gill?</p> <p>17 MR. GILL: Okay. New scenario. This is 18 called a financial assurance, not a bond. Financial 19 assurance, financial guarantee. It's an A, B, C 20 transaction in which A, the permittee sets up some sort 21 of financial guarantee, B, the money from that financial 22 assurance goes to the permittee, and then, C, the 23 permittee pays that to the division.</p> <p>24 If not all the money is needed, okay, then the 25 permittee only has to pay you what's needed. If there's</p> <p style="text-align: right;">Page 87</p>	<p>1 reasonable parties rather than this board. But in the 2 absence of it, that same statute I read, gives this 3 board authority to frame its own solution in my view. 4 And so --</p> <p>5 MR. ALLEN: Mr. Gill --</p> <p>6 MR. GILL: -- I think there's some solutions 7 here, it just needs to be worked out by reasonable 8 people.</p> <p>9 CHAIRMAN JOHNSON: Mr. Allen, go ahead.</p> <p>10 MR. ALLEN: Mr. Gill, I'd refer you to the 11 first full paragraph on that page you were just reading 12 from, Page 9619. The Office of Surface Mining says, 13 "They are providing for the use of trust funds and 14 annuities in Tennessee as an alternative bonding system 15 provided for in section 509C of the act." And as I 16 pointed out, the federal act does, indeed, provide that 17 the regulatory agency may implement alternative bonding 18 systems in addition to the three types mentioned under 19 that authority.</p> <p>20 The State of Utah did not include a provision 21 comparable to 509C delegating that authority for 22 implementing alternative bonding systems down to either 23 this board or the Division. So if we were going to try 24 to expand the -- the universe of the types of financial 25 instruments that can be posted as a bond, if we're going</p> <p style="text-align: right;">Page 89</p>

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<p>1 to go into the realm of alternative bonding systems, I'm 2 afraid that requires going back to the legislature. 3 MR. GILL: Okay. 4 MR. PAYNE: Done. 5 CHAIRMAN JOHNSON: No other questions for the 6 board. Mr. Quigley, did you have a question? 7 MR. QUIGLEY: No. 8 CHAIRMAN JOHNSON: Mr. Jensen? 9 MR. JENSEN: I do. 10 My question goes to Genwal counsel, I guess I 11 pose the question to your reading of the statute. Does 12 the board and the Division have authority to require 13 some form of surety to handle ongoing costs of water 14 treatment? 15 MR. ALLEN: The short answer is no. The form 16 of surety they have is retaining jurisdiction over the 17 site and requiring the operator to pay and provide for 18 the treatment system for as long as it's necessary. 19 MR. JENSEN: So your position is -- let me get 20 this straight. Your position is no bond, period, so 21 when in your brief you tell me, you say that they got 22 the cart before the horse, what if we say they got the 23 cart before the horse, are you going to say again, then, 24 if we send it back to the Division and say, You've got 25 to comply with 830, that they don't have the authority</p> <p style="text-align: right;">Page 90</p>	<p>1 permits or continued operations on posting of a bond. 2 And I don't think we're disputing that. I mean, the 3 question is what do you bond for and what kind of 4 financial instruments do you use to bond? 5 MR. JENSEN: And you don't think there's a 6 legitimate concern about ongoing treatment of iron-laden 7 water if Genwal went away? 8 MR. ALLEN: At this point, no, I don't think 9 that's a legitimate concern. Certainly, the concern 10 over ongoing treatment, if this is perpetual, is 11 legitimate. But asking the question of what we'll do if 12 Genwal goes away, the statute provides for addressing 13 that question in a limited set of circumstances and it 14 just doesn't fit. 15 MR. JENSEN: And so I can't remember but it 16 seems, didn't your brief touch on rulemaking? 17 MR. ALLEN: It did touch on rulemaking. 18 MR. JENSEN: But if you say that this board 19 doesn't have the authority short of the legislature, 20 again, that's kind of a moot argument, isn't it? 21 MR. ALLEN: Well, there are two possibilities. 22 MR. JENSEN: Let me ask you -- 23 MR. ALLEN: Okay. 24 MR. JENSEN: If this board were to say, We 25 think that there's a basis to require a surety here, but</p> <p style="text-align: right;">Page 92</p>
<p>1 to do that? 2 MR. ALLEN: I'm afraid so. 3 MR. JENSEN: Well, then, that kind of makes 4 your argument kind of meaningless when you tell us 5 they've got the cart before the horse. 6 MR. ALLEN: They've got the cart before the 7 horse assuming they have a horse. I think you know 8 we're certainly arguing in the alternative. 9 MR. JENSEN: You think we don't have that 10 authority within 40-10-6 of the code? 11 MR. ALLEN: That's the provision that Mr. Gill 12 referred to earlier? 13 CHAIRMAN JOHNSON: 40-10-16. 40-10-16. 14 MR. ALLEN: 40-10-16. 15 MR. JENSEN: 40-10-6 . 16 MR. ALLEN: Dash 6. That is the provision 17 Mr. Gill referred to earlier which provides that the 18 board and the Division may do all things necessary to 19 enforce the provisions of this act. That just begs the 20 question of is there a provision of this act for them to 21 enforce at this point? 22 MR. JENSEN: Well, I'm looking at subsection 23 7. 24 MR. ALLEN: Bear with me. 25 Indeed, there is the authority to condition</p> <p style="text-align: right;">Page 91</p>	<p>1 in all fairness to both Genwal and the industry that 2 we're going to have rulemaking so that everybody 3 understands the playing field, are you going to take the 4 position that we don't have the authority to do the 5 rulemaking because there isn't the underlying 6 authorization from the legislature? 7 MR. ALLEN: I think the rulemaking could go 8 further and be more comprehensive with authorization 9 from the legislature than without it and that's because 10 of the alternative bonding authority that's absent right 11 now. 12 Alternative bonding authority, I think, would 13 be necessary to expand the types of financial 14 instruments beyond the three types we've talked about. 15 If, on the other hand, we were going to try to 16 make this work within the authorized types of financial 17 instruments, then I don't think you need additional 18 legislative authority. 19 MR. JENSEN: Well, it seems to me you've got 20 all these arguments out there but at the end of day your 21 position is there is no authority that's been granted by 22 the legislature, period. That's where you cut to. I 23 think that's what you're saying. 24 MR. ALLEN: And, certainly, as the Division 25 has laid out their intent under Division Order 10, it</p> <p style="text-align: right;">Page 93</p>

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<p>1 appears to me that they're asking to implement an 2 alternative bonding system. 3 MR. JENSEN: I guess I'm trying to understand 4 it. If this board wants to fashion some kind of a 5 resolution to this, I'm hearing you say that we don't 6 have that authority. 7 MR. ALLEN: It would have to be within the 8 framework of the existing financial instruments, the 9 existing authorized, those three types. 10 CHAIRMAN JOHNSON: Any other questions? 11 MR. GILL: I think that pretty well sums it 12 up. 13 CHAIRMAN JOHNSON: I'm hoping none of the 14 counsel feels they need to make any kind of closing 15 statement. 16 MR. ALDER: I already took care of that need, 17 I felt. 18 CHAIRMAN JOHNSON: Okay. 19 MS. DRAGOO: I did want to address your 20 question about the chronology you had suggested that, 21 you know, if Genwal had complied initially but I just 22 want to point out that this Division order supersedes 23 all the old timelines and time frames by its own terms 24 and so we started anew with new time frames and in 25 Genwal's opinion it's in compliance, it has complied</p> <p style="text-align: right;">Page 94</p>	<p>1 too? 2 MR. ALDER: I thought it was just a comment. 3 MR. GILL: I'm just saying that we're going to 4 go in and deliberate. If you guys want to talk about it 5 knowing that that may be very well where we end up, that 6 might be wise. 7 CHAIRMAN JOHNSON: I don't think we're going 8 to deliberate on that at this point in time. We are 9 going to take this under advisement. 10 MR. GILL: Whatever. 11 CHAIRMAN JOHNSON: Bearing in mind that we 12 limited today's discussion to the legal questions 13 involved, not the technical aspects of this matter, is 14 there anyone else present that would like to address the 15 board regarding the legal matters that we've been 16 discussing? 17 Okay. Seeing nobody, we are going to take 18 this under advisement and get back to the parties as 19 quickly as we can. 20 We appreciate all the input today and we will 21 try to do this as quickly as we can. 22 Do we need to continue the matter or are we 23 just -- we're taking the decision on this phase -- 24 MR. JENSEN: On this limited issue. 25 CHAIRMAN JOHNSON: -- under advisement.</p> <p style="text-align: right;">Page 96</p>
<p>1 with all the time frames and submitted everything which 2 the Division requested within those time frames. 3 Now, the Division may be getting back to us 4 with deficiencies but, you know, we feel like we've met 5 the terms of the order. 6 CHAIRMAN JOHNSON: Okay. 7 MR. ALDER: To be more correct, I will only 8 say that the ABS argument that that's a requirement, 9 that's a strawman, that's not a requirement. It's one 10 option. It's a way to address this. The board, the 11 Division would not resist rulemaking, it would allow for 12 that, and I think the provisions that have been cited by 13 Mr. Jensen would allow for that kind of rulemaking. 14 Thank you for your indulgence. 15 MS. DRAGOO: Thank you. 16 MR. GILL: One final comment. Just to 17 comment. If the board was to take 40-10-6, subsection 7 18 which says, "The condition issuance of permit on bonds, 19 deposits, or sureties," and then subsection 9, "Do all 20 other things necessary to enforce the provisions of this 21 act," if we were to let you know that that would be 22 something on which we would hang our decision, would you 23 be willing to discuss this between you and fashion a 24 solution that may be better than what we would do? 25 CHAIRMAN JOHNSON: Who are you addressing that</p> <p style="text-align: right;">Page 95</p>	<p>1 Julie Ann, is this on next month's docket 2 already? 3 (Discussion off the record.) 4 CHAIRMAN JOHNSON: Okay. So we will continue 5 this matter until the February hearing, February 23rd. 6 Okay. All right. Let's take about a 7 ten-minute break. And then we will get into the matter, 8 the El Paso Company Injection Well request. 9 Thank you, everybody. Let's try to reconvene 10 at 3:10. 11 (PROCEEDINGS IN THE ABOVE-ENTITLED 12 MATTER WERE CONCLUDED.) 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 97</p>

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<div>1 REPORTER'S CERTIFICATE</div> <div>2 STATE OF UTAH)</div> <div>3 : SS.</div> <div>4 COUNTY OF UTAH)</div> <div>5 I, Jeff S. Eaton, do certify that I am a</div> <div>6 Certified Court Reporter in and for the State of Utah.</div> <div>7 That as such reporter, I reported the occasion</div> <div>8 of the proceedings of the above-entitled matter at the</div> <div>9 aforesaid time and place.</div> <div>10 That the proceeding was reported by me in</div> <div>11 stenotype using computer-aided transcription consisting</div> <div>12 of pages 3 through 97 inclusive;</div> <div>13 That the same constitutes a true and correct</div> <div>14 transcription of the said proceedings;</div> <div>15 That I am not of kin or otherwise associated</div> <div>16 with any of the parties herein or their counsel, and</div> <div>17 that I am not interested in the events thereof.</div> <div>18 WITNESS my hand at Provo, Utah, this 3rd day</div> <div>19 of February, 2011.</div> <div>20</div> <div>21</div> <div>22 _____</div> <div>23 Jeff S. Eaton, RPR, CSR</div> <div>24</div> <div>25</div> <div>Page 98</div>	

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